EDITOR'S NOTE

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85-5487

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ORIGINAL

MICHAEL MARNELL SMITH,

Petitioner,

v.

RAYMOND K. PROCUNIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
J. Lloyd Snook, III
230 Court Square
Charlottesville, Virginia 22901

804-293-8185

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QUESTIONS PRESENTED

1. Where Dr. Pile had been appointed by the Court to conduct an independent psychiatric evaluation of Petitioner to help defense counsel decide whether to offer a psychiatric defense or psychiatrically-based claim in mitigation, but defense counsel had decided not to call Dr. Pile as a witness or to offer any other testimony putting Petitioner's mental condition in issue, was Petitioner's Fifth Amendment privilege against self-incrimination violated when the prosecution called Dr. Pile to testify at the sentencing hearing about incriminating statements made by Petitioner during the evaluation?

2. In a capital murder case in which the jury imposed the death sentence finding two aggravating circumstances, one of which was based on the constitutionally inadmissible testimony of Dr. Pile, does this Court's decision in Zant v. Stephens require appellate courts to ignore the constitutional error and affirm the death sentence?

3. Where Petitioner's trial counsel failed to obtain an adequate mental evaluation, to protect Petitioner's Fifth Amendment rights in connection with a pretrial mental evaluation, or to prepare for and conduct an adequate examination of psychiatric experts at trial, was Petitioner denied effective assistance of counsel at and in connection with the capital sentencing phase of his trial?

4. Where the instructions given to Petitioner's jury at the sentencing phase of his capital trial did not make clear to the jury its prerogative to impose a life sentence even if it found one or more aggravating circumstances, and in fact clearly implied that the jury was obliged to impose a death sentence if it found one or more aggravating circumstances and no superseding mitigating circumstances, was Petitioner denied his right to an individualized determination that death was the appropriate punishment in his case?

Limited to
Question
1 & 2

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ASSIGNMENTS OF ERROR

1. The Fourth Circuit erred in holding that it was barred by Zant v. Stephens from reversing Petitioner's death sentence because constitutionally inadmissible evidence was introduced at his sentencing hearing.

2. The Fourth Circuit erred in holding that Petitioner received the effective assistance of counsel at his trial.

3. The Fourth Circuit erred in denying Petitioner's claim that his jury had been improperly instructed at the sentencing phase of the trial.

JURISDICTION

The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive standards for imposition of the death sentence is Va. Code Ann. § 19.2-264.2 (Cum. Supp. 1977):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to Va. Code Ann. § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or
>
> (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or
>
> (iii) the victim was a participant in the defendant's conduct or consented to the act, or
>
> (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct

> or to conform his conduct to the requirements of law was significantly impaired; or
>
> (v) the age of the defendant at the time of the commission of the capital offense.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S. CONST. AMEND. VI.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND. VIII.

> No State shall...deprive any person of life, liberty, or property, without due process of law...

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Michael Marnell Smith was convicted and sentenced to death for the rape and murder of Audrey Weiler on May 23, 1977. He was tried by a jury in a trial beginning on October 31, 1977, and he was found guilty on November 2, 1977. After a sentencing hearing held on November 3, 1977, the jury returned with a recommendation of death. Judge Russell M. Carneal, Judge of the Circuit Court for the City of Williamsburg and the County of James City, imposed the death sentence on November 30, 1977.

The Supreme Court of Virginia affirmed the conviction and sentence in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979).

Smith then filed a state Petition for Writ of Habeas Corpus, and an evidentiary hearing on ineffective assistance of counsel was held on November 8, 1979. Judge Carneal denied the Petition for Writ of Habeas Corpus by order dated April 16, 1980. The Petition for Appeal to the Virginia Supreme Court of Virginia was denied, and his Petition for Writ of Certiorari was also denied. Smith v. Morris, cert. denied, 454 U.S. 1128 (1981).

A Petition for Writ of Habeas Corpus was filed pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia. The case was referred to a magistrate, but no new factual matters were developed. The District Court, following the recommendation of the magistrate, dismissed the Petition on December 4, 1984.

An appeal was then taken to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit affirmed on May 10, 1985.[1] A Petition for Rehearing or Rehearing En Banc was denied on June 26, 1985.

STATEMENT OF FACTS

According to his confession, Michael Smith met Audrey Weiler on a beach near his home when he stopped to help her remove briars from her feet. He then grasped her arm and walked with her to a wooded area near the water, pulled out a knife and asked her to take off her clothes. She complied, while protesting. Smith, using a condom, had intercourse with Mrs. Weiler and then started choking her with both hands. He dragged her into the water and submerged her head for several seconds. He subsequently stabbed her in the back with the knife. He left the body and returned home. The medical examiner concluded that the immediate cause of death was drowning, though the stab wounds and the strangulation could also have caused death.

Two days after the offense, investigators came to the Gospel Spreading Church Farm, where Smith lived and worked. When he was confronted with the investigators' suspicions, Smith asked for a Bible. His brother brought a Bible, and Smith and the investigators knelt and prayed. Smith then gave his confession.

Pre-trial Psychiatric Examinations

On May 26, 1977, David F. Pugh was appointed to represent Smith: he immediately asked that Smith be examined to determine whether he was competent to stand trial. The examina-

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1. Although the case has been marked for publication, counsel is unaware of any citation to the reporter system. Smith v. Procunier, ___ F.2d ___ (No. 85-4001) (4th Cir. 1985).

tion was conducted by Dr. Palmaz, who stated that, in his opinion, Smith was competent to stand trial.

Mr. Pugh was particularly interested in exploring possible psychiatric mitigating evidence. On July 1, 1977, at Mr. Pugh's request, the General District Court ordered an evaluation by Dr. James C. Dimitris and the staff of the Forensic Unit at Central State Hospital; Smith was hospitalized there from July 5, 1977 to August 23, 1977. Dr. Dimitris told Smith before the examination began that any statements by him during the examination could be used against him at either the guilt or sentencing phase of his trial. Dr. Dimitris diagnosed Smith as having an "inadequate personality", and concluded that he was legally sane at the time of the offense.

By Order dated September 28, 1977, Smith's counsel was granted permission to have him examined by Dr. Wendell Pile, a Williamsburg psychiatrist. Dr. Pile conducted a one-hour examination of Smith on October 1, during which he encouraged Smith to make full disclosure of the circumstances of the offense with which he was charged, and of any prior offense. He did not advise or warn Smith that copies of his report would be sent to the Commonwealth's Attorney and the Court, or that any of Smith's statements could be used against him at trial. During this interview, Smith told Dr. Pile that, while driving a school bus, he had torn off a girl's clothes before deciding not to rape her.

In his October 1, 1977, letter to the court and counsel, Dr. Pile mentioned Smith's statements concerning the school bus incident, which until that time had been unknown to either defense counsel or the Commonwealth's Attorney. In that letter, Dr. Pile "diagnosed" Smith as a "sexually deviant sociopath."

The Trial

This was the first capital murder case tried under the new Virginia death penalty statutes, which became effective July 1, 1977. Accordingly, virtually everything relating to the sentencing phase was entirely new to counsel and to the Court.

There was no real effort to contest Smith's guilt, and this appeal does not seek to overturn Smith's conviction.

At the sentencing hearing, the prosecution put on four witnesses. First, Dr. Pile was called to tell the jury what Petitioner had told him about the school bus incident.

> Q. Did he tell you anything about the girl on the school bus?
>
> A. He did.
>
> Q. What did he say about that?

At this point, counsel objected.

> Your Honor, we're going to object to any testimony made by Dr. Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged...as well as the fact that -- I think that the Commonwealth has to lay the foundation as to what the Doctor instructed Mr. Smith with respect to his rights to say anything to him.

App. 51-52. Judge Carneal overruled the objection, for two reasons. First, he noted that Dr. Pile was, in essence, a "defense" psychiatrist.

> You, having done this, and Mr. Smith having talked to him, I don't believe that Dr. Pile has any duty to inform him that anything he may say to him may be used for or against him in a court of law, as a police officer does under the Miranda.

App. 52-53. The court also ruled that such testimony was made admissible by the broad nature of the capital sentencing inquiry. App. 53. Dr. Pile was permitted to answer the question.

> A. He explained that he was driving a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.
>
> Mr. Person: that's all the questions I have.

App. 55-56.

The Commonwealth's Attorney had not attempted to elicit Dr. Pile's "diagnosis", but defense counsel, inexplicably, did.

> Q. Dr. Pile, in your diagnosis, what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopathic personality, sexual deviation, rape.
>
> Q. What is that?
>
> A. A person who -- is also described as an antisocial personality. They're all sort of

> the same type of -- of personality disorder. The basically [sic] people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of -- of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

App. 57-58.

Counsel testified at the state habeas hearing that he regarded Dr. Pile's diagnosis as unfavorable, that he did not think the diagnosis was supportable on the basis of Dr. Pile's examination, that he would not have called Dr. Pile to testify, that he did not have any idea (at the evidentiary hearing) why he asked Dr. Pile about the diagnosis, that he had not researched federal law concerning possible objections to Dr. Pile's testimony, and that he had not read any psychiatric literature or taken any other steps to familiarize himself with the substantive knowledge necessary for effective cross-examination.

The second Commonwealth witness was Dr. James C. Dimitris, forensic psychiatrist at Central State Hospital, who testified that Smith was competent to stand trial and legally sane at the time of the offense. On cross-examination, defense counsel asked Dr. Dimitris for his diagnosis of Smith. During Dr. Dimitris' testimony, two jurors asked him to explain the difference between his diagnosis ("inadequate personality disorder") and Dr. Pile's diagnosis ("sociopathic personality disorder"), referring particularly to the implications for successful treatment.

The prosecution also called Smith's Parole Officer, Frederick Toepke, who testified about Smith's prior rape conviction, and Investigator Fred Dunford, who again read Smith's confession.

The defense recalled Mr. Toepke to testify that Smith had no criminal record other than the 1973 rape charge, and then called twelve character witnesses and Smith's parents, all of whom gave very brief testimony to the effect that Smith had been a regular churchgoer, a member of the choir, a good bus driver, a

conscientious student at Bruton High School, and a good soldier in Vietnam. His parents also testified about life on the family-owned Gospel Spreading Farm.

When counsel and Judge Carneal retired to chambers to prepare the jury instructions for the sentencing phase of the trial, defense counsel repeatedly objected to Commonwealth's Instruction 1 (found at App. 63), because it did not expressly tell the jury that it could recommend a life sentence even if circumstances in aggravation were found (and even if no mitigating circumstances were found), and because the instruction actually implied that the jury was required to impose the death penalty in such a case. The court eventually granted Instruction 1 and refused to grant Smith's proposed Instruction B (found at App. 65), which would have cured this defect.

The Inadequacy of the Psychiatric Examinations

Though the psychiatric examinations were sought by Mr. Pugh to develop proof of the statutory mitigating circumstances, neither he nor his co-counsel ever discussed mitigation with either psychiatrist. Dr. Dimitris and Dr. Pile were requested only to assess Smith's competency to stand trial and sanity at the time of the offense: neither examiner was asked to perform the more subtle evaluation required for a determination of the presence of the mitigating circumstances outlined in the capital sentencing statute. Dr. Dimitris testified that he was not even made aware of the aggravating and mitigating circumstances in the death penalty statute until the day of the sentencing hearing, when the Commonwealth's Attorney explained to Dr. Dimitris the dangerousness criterion. Although Mr. Pugh had met with Dr. Dimitris at Central State Hospital during the summer of 1977 to discuss his evaluation, Mr. Pugh never asked Dr. Dimitris for an opinion on mitigating circumstances, and he did not even tell Dr. Dimitris what the mitigating circumstances were.

Mr. Pugh never contacted Dr. Pile to discuss the purpose of the evaluation. Dr. Pile testified that none of the provisions of the capital sentencing statute were ever brought to his attention. In fact, Dr. Pile did not realize that the

capital sentencing definitions of mitigating mental abnormality were not interchangeable with the standard M'Naghten inquiry for insanity.

At the state habeas hearing, Petitioner called Dr. C. Robert Showalter, M.D., the Clinical Director of the Forensic Psychiatric Clinic at the University of Virginia, to testify about the adequacy of the 1977 psychiatric evaluations. Dr. Showalter, who at the time of the hearing had evaluated five defendants under the capital sentencing statutes, testified, without contradiction, that an examination sufficient to address the statutory mitigating circumstances would have to be broader in scope and more detailed than the examinations usually conducted to determine competency or sanity, and the examinations performed upon Smith would not have been adequate to develop evidence in mitigation, even had defense counsel sought to elicit such testimony.

Both Dr. Showalter and Dr. Dimitris were critical of Dr. Pile's examination and conclusion. Both testified that a one-hour examination of the nature performed by Dr. Pile, eliciting the information that Dr. Pile elicited, could not provide sufficient information to support his diagnosis. Dr. Showalter, drawing on the American Psychiatric Association's Diagnosis and Statistical Manual, testified that a longer, deeper evaluation would be necessary to confirm such a diagnosis. Dr. Showalter also testified that Dr. Pile's generalized speculation in his trial testimony, about the "usual" behavior of sociopaths, lacked any scientific foundation.

Mr. Pugh testified that he had advised Smith not to discuss the offense or any prior offenses "with anyone". Although he did not recall whether he had specifically warned Smith not to discuss the offense with the psychiatric examiners, he testified that he believed that he did not expect him to discuss the offense with the psychiatrists. In fact, Smith discussed the offense with both examiners. Before beginning his examination, Dr. Dimitris gave Smith the equivalent of Miranda warnings; Dr. Pile did not.

How the Issues Were Preserved on Appeal

Defense counsel did not assign as error on direct appeal the admission of Dr. Pile's testimony, though the issue had been preserved at trial. On appeal, the issue was raised and thoroughly discussed in the Amicus Brief of the Post-Conviction Assistance Project of the University of Virginia School of Law.[2] Notwithstanding questions about procedural default, the Fourth Circuit chose to address the merits of the issue, noting the recent decision of Reed v. Ross, ___ U.S. ___, 82 L.Ed.2d 1 (1984), and Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), aff'd en banc, 754 F.2d 520 (1985), cert. granted sub nom. Carrier v. Sielaff, ___ U.S. ___, 105 S.Ct. 3523 (1985).

The instruction issue was fully preserved, both at trial and on appeal.

SUMMARY OF REASONS FOR GRANTING CERTIORARI

I

This Court should grant certiorari and reverse the judgment below because the Fourth Circuit has fundamentally misconstrued Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983).

In Stephens, this Court held that a death sentence need not be struck down when one aggravating circumstance is subsequently held to be invalid, provided that at least one untainted aggravating circumstances remains, and provided that the evidence introduced in support of the invalid circumstance would have been admissible anyway.

In the present case, the Fourth Circuit in effect assumed that evidence introduced in support of the "future dangerousness" criterion was inadmissible, but held that the presence of the finding of the "vileness" aggravating circumstance would support the death sentence. The evidence was clearly inadmissible; see Battie v. Estelle, 655 F.2d 75 (5th Cir. 1981); Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978); Ake v. Oklahoma, ___ U.S. ___, 84 L.Ed.2d 53 (1985). The record

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2. Counsel for Amicus Post-Conviction Assistance Project is one of Smith's present co-counsel.

shows that the prosecution relied heavily on this inadmissible testimony in its closing argument and that the jury's finding of "future dangerousness" played a determinative role in its decision to impose a death sentence.

The Fourth Circuit arrived at its interpretation of Zant v. Stephens by quoting from that opinion out of context, and by then dropping out a key limiting phrase. This Court had held in Zant v. Stephens that:

> [A] death sentence supported by a least one valid aggravating circumstance need not be set aside under the second Stromberg rule simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty.

Zant v. Stephens, 77 L.Ed.2d at 254 (emphasis added). However, the Fourth Circuit left out the underlined portion of the above quote when it cited it as being the holding of this Court. Of course, by omitting the limiting language, the Fourth Circuit converted a very narrow principle into a sweeping rule of law that far exceeds the ruling of this Court. In doing so, the Fourth Circuit overlooked this Court's repeated comments that Zant v. Stephens was limited to cases in which the evidence was in fact properly admissible. 77 L.Ed.2d at 256 & n.24.

This interpretation of Zant v. Stephens is wrong, it is unprecedented -- Petitioner has been unable to find any other federal decision predicated upon a similar interpretation -- and it is dangerous.

First, it encourages appellate courts to be lazy -- to overlook constitutional violations (perhaps even egregious constitutional violations) in capital cases. See Tuggle v. Commonwealth, ___ Va. ___, ___ S.E.2d ___ (September 6, 1985) (on remand from United States Supreme Court) (opinion has been reproduced in the Appendix at 78-92); Ross v. State, 254 Ga. 22, 226 S.E.2d 194, 203-205 (1985) (citing James Briley v. Bass), 750 F.2d 1238 (4th Cir. 1985). Second, in any state with a "vileness" criterion (or a similar aggravating circumstance), the prosecution would be free, as a matter of federal constitutional law, to violate with impunity virtually every constitutional

protection to which a capital defendant may be entitled at sentencing -- as long as the crime involved more than a single gunshot. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980).

It is important that this court grant certiorari and reverse the Fourth Circuit, on this ground alone, for three reasons:

1. The Fourth Circuit's opinion is wrong:

2. The Fourth Circuit's opinion is in conflict with rulings of the Fifth and Eleventh Circuits in Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), Morgan v. Zant, 743 F.2d 775, 779 (11th Cir. 1984).

3. The Fourth Circuit's opinion, and the logic underlying it, is being relied upon by state courts, so that the pernicious effects of this error are spreading.

This Court should grant certiorari and either hear this issue along with the other issues involved in the case, or simply reverse and send the case back to the Fourth Circuit for resolution of the issues which that Court has skirted.

II

A rule of law permitting the prosecution to make affirmative use of psychiatric testimony in a case such as this forces the capital defendant to choose between his Fifth Amendment right to remain silent and his due process and Sixth Amendment rights to explore and present psychiatric evidence in mitigation of a death sentence. This Court has previously held that a criminal defendant cannot be forced to choose between his Fifth Amendment right to remain silent and his Fourth Amendment right to challenge the validity of a search. Simmons v. United States, 390 U.S. 377 (1968). Federal appeals courts have held that a criminal defendant cannot be forced to choose between his Fifth Amendment right to remain silent and his right to explore and present psychiatric evidence on the questions of competency or sanity. Gibson v. Zahradnick, 581 F.2d 75, 78 (4th Cir. 1978), and cases cited at 78. There does not appear to be any conflict among the circuits, as at least seven circuits have held that a

defendant cannot be forced to make that choice. This court has never made such a rule the law of the land, however.

The rule of Gibson v. Zahradnick, must also be explicitly made applicable in capital cases. Petitioner asks this Court to take one of two courses of action. The first course of action would be simply to remand this case back to the Fourth Circuit, informing the Fourth Circuit that Zant v. Stephens does not apply to this case, and suggesting that they consider this issue (and the other issues) on its merits. The second option would be to grant certiorari on this issue as well, and to then resolve both the general question of whether a criminal defendant may be forced to choose between his Fifth Amendment right to remain silent and his due process and Sixth Amendment rights to explore and present psychiatric evidence, and also the specific question of whether a capital defendant may be forced to choose between his Fifth Amendment right to remain silent and his due process and Sixth Amendment rights to explore and present psychiatric evidence in mitigation of his death sentence.

III

A capital defendant has a constitutional as well as a statutory right to have the sentencing jury told that they are free to impose a life sentence, even if they should find one or both aggravating circumstances and even if they should find no mitigating circumstances. Smith's trial counsel requested the trial court to instruct the jury explicitly that it could return a life sentence, even if they found aggravating circumstances but no mitigating circumstances. The court refused to do so and instructed the jury instead in a way which clearly implied that the jury was required to impose a death sentence unless it found overriding mitigating circumstances.

These instructions compromised Smith's Eighth Amendment right to an individualized determination that death is the appropriate penalty in his case. Lockett v. Ohio, 438 U.S. 586, 601 (1978). In an important line of cases concerning the Georgia statute, the Fifth and Eleventh Circuits have considered the

implications of Lockett for jury instructions on mitigation. The leading case is Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B, 1981), in which the Court invalidated instructions which failed to "clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Id. at 471.

The Fourth Circuit held that the instructions in Smith's case were constitutionally adequate, relying on its prior ruling in James Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), which explicitly rejected the rulings of the Fifth and Eleventh Circuits, and which is predicated on the view that the federal courts should avoid "detailed scrutiny of state jury instructions on collateral review." The Court implied that Zant v. Stephens had effectively overruled Spivey v. Zant,[3] in spite of the fact that the Eleventh Circuit continues to follow and apply Spivey v. Zant. See Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Moore v. Zant, 722 F.2d 640 (11th Cir. 1984); Finney v. Zant, 709 F.2d 643 (11th Cir. 1983). The Fourth Circuit seems to contend that Zant v. Stephens requires that the federal courts abandon constitutional scrutiny of state sentencing decisions in capital cases: the Fourth Circuit has suggested, for example, in James Briley v. Bass, 750 F.2d at 1243, that the Lockett principle of individualization is limited to "a right to present mitigating evidence and a ban on mandatory death penalties." Eddings v. Oklahoma, 455 U.S. 104 (1982), makes it clear that the principle also forbids any state-imposed restriction on the defendant's right to an individualized determination of the suitability of a death sentence in his case.

This court should grant certiorari on this issue for the following reasons:

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3. The Georgia Supreme Court has relied upon the Fourth Circuit's reading of Zant v. Stephens (in James Briley v. Bass), refusing to follow the teachings of Spivey v. Zant and its progeny. See Ross v. State, 254 Ga. 22, 326 S.E.2d 194, 203-205 (1985).

1. The Fourth Circuit's ruling in this case is in conflict with Spivey v. Zant, Morgan v. Zant, and other opinions of the Fifth and Eleventh Circuits.

2. The Fourth Circuit's continued belief that federal courts should avoid "detailed scrutiny of state jury instructions on collateral review" means that, at least in the Fourth Circuit and in any other jurisdiction that follows this logic, there will be no review of jury instructions;

3. The refusal of the trial court to properly instruct the jury, as required both by Virginia law and by federal constitutional law, has resulted in a fundamental unfairness to Michael Smith, which should be corrected.

IV

The Court's decision in Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), established the general principles governing the resolution of claims that criminal defendants have been denied adequate assistance of counsel under the Sixth and Fourteenth Amendments. The record in Smith's case amply demonstrates that his trial counsel performed in a constitutionally deficient manner at and in connection with the capital sentencing phase of his trial. In addition, the record shows that counsel's errors were prejudicial even under the standard established by the Court in Strickland. However, the Fourth Circuit failed to give meaningful consideration to this claim, and appears to interpret Strickland to erect a virtually insurmountable barrier to relief. This Court should grant certiorari to apply Strickland to the sentencing phase of this case and to give state and federal courts further guidance regarding the criteria for establishing a constitutional violation in this context.

ARGUMENT

I

PETITIONER'S DEATH SENTENCE MUST BE SET ASIDE BECAUSE IT WAS BASED, TO A DEMONSTRABLY PREJUDICIAL DEGREE, ON STATEMENTS ADMITTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

As part of counsel's search for mitigating evidence, counsel obtained permission for Dr. Wendell Pile to evaluate Michael Smith, although his report was transmitted to the court and the prosecution as well as to the defense. Dr. Pile did not warn Smith that his disclosures could be used to support a death sentence. During the evaluation, Smith described a previously undisclosed incident during which, according to him, he had assaulted, and almost raped, a girl on a school bus. Dr. Pile was not called to testify at the guilt phase of the trial, and the defense did not plan to call him at the sentencing phase, or to adduce any psychiatric evidence in mitigation. The prosecution called Dr. Pile as its witness at the sentencing phase solely to repeat Petitioner's statement about the school bus incident to prove the statutory aggravating circumstance that "there is a probability...that [Petitioner] would commit criminal acts of violence that would constitute a continuing serious threat to society." Defense counsel objected to Dr. Pile's testimony.[4] The trial judge overruled the objection.

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4. Counsel did not raise the issue on direct appeal, although it was raised and fully discussed in an amicus brief submitted by the Post-Conviction Assistance Project of The University of Virginia School of Law. The Virginia Supreme Court did not address the issue. Both the state habeas court and the federal district court regarded the claim as having been forfeited due to procedural default. Petitioner argued that the federal courts should address the merits of the claim, notwithstanding the procedural default, because counsel's failure to preserve the issue on appeal was attributable to ignorance or neglect rather than informed professional deliberation. See Carrier v. Hutto, 724 F.2d 396 (1983), aff'd en banc, 754 F.2d 520, cert. granted sub nom. Carrier v. Sielaff, 105 S. Ct. 3523 (1985), interpreting the "cause" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977).

The Fourth Circuit chose to address the merits of Petitioner's claim, implicitly ruling that Petitioner had demonstrated sufficient "cause" and "prejudice" to satisfy the requirements of Wainwright v. Sykes, and it is that resolution on the merits for which Petitioner seeks review.

The Fourth Circuit assumed that the evidence was in fact inadmissible, but then relied upon Zant v. Stephens, 462 U.S. 862 (1983), in saying that the unchallenged finding of "vileness" obviated the necessity for consideration of defects in the finding of future dangerousness.

A. Nothing in This Court's Decision in Zant v. Stephens Suggests That a Prejudicial Constitutional Defect in the Sentencing Process Should Be Ignored Simply Because the State Proved an Untainted Statutory Predicate for a Death Sentence.

1. The Fourth Circuit's Handling of the Issue.

In its opinion below, the Fourth Circuit correctly noted that the

> jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (i.e., violence) and (b) vileness. The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness". The evidence presented to the jury supporting a showing of "vileness" was unchallenged.

Slip Op. at 6-7. However, the Court's reasoning took a breathtaking leap when it concluded that the Constitution means that "any one aggravating circumstance deemed sufficient by the jury suffices," Slip Op. at 7, relying upon Linwood Briley v. Bass, 742 F.2d 155, 165 (4th Cir. 1984)[5], and Zant v. Stephens, 462 U.S. 862, 884, 77 L.Ed.2d 235 (1983).

It is certainly true that a finding of an aggravating circumstance "suffices" to establish a constitutionally adequate predicate for a death sentence if the aggravating circumstance "genuinely narrow[s] the class of persons eligible for the death penalty" and "reasonably justif[ies] the imposition of a more

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5. The Fourth Circuit's citation to its own decision in Linwood Briley v. Bass was not pertinent since Briley objected only to the phraseology of the "vileness" instruction and did not claim either that the evidence was legally insufficient to establish the circumstance or, more importantly, that otherwise inadmissible evidence had been offered to prove it. Petitioner's own case, where the defense needs access to a psychiatric examination to explore possible claims in exculpation or mitigation. In these cases, the Constitution requires more than Miranda warnings; if the defense is to have meaningful access to a psychiatric assessment, he must be assured that his disclosures to the examiner will not be used to make the prosecution's case.

severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 77 L.Ed.2d at 249-250. But the finding of an aggravating circumstance does not foreclose corstitutional scrutiny of other aspects of a sentencing hearing.

For example, the finding of an aggravating circumstance does not "suffice" to establish the constitutionality of a death sentence when the defendant was precluded from introducing evidence concerning his character or record as a basis for mitigation: Lockett v. Ohio, 438 U.S. 586 (1978), established that the defendant has a constitutional right to an individualized determination of the propriety of a death sentence. Nor does the finding of an aggravating circumstance "suffice" to establish the constitutionality of a death sentence when the sentencer considered unreliable evidence which the defendant had no opportunity to confront and cross-examine: Gardner v. Florida, 430 U.S. 349 (1977), established that the defendant has a right to a fair and reliable determination of the disputed issues in a capital sentencing proceeding.

Thus, it is clear that a finding of a valid aggravating circumstance does not "suffice" to override any and all constitutional defects in a capital sentencing hearing. In Smith's case, evidence introduced by the prosecution to prove its case-in-aggravation and to persuade the jury to impose a death sentence was constitutionally inadmissible under the Fifth Amendment, and this evidence had a prejudicial impact on the jury's deliberations. The fact that the state satisfied its burden of proving one statutory aggravating circumstance with untainted evidence does not "suffice" to erase the prejudicial impact of the constitutional error: indeed, that fact is constitutionally irrelevant to the resolution of Smith's case.

How does the Fourth Circuit explain its contrary conclusion? It fails to offer any explanation at all. In lieu of an explanation, the Court merely offers a quotation from this Court's opinion in Zant v. Stephens, 462 U.S. at 884, 77 L.Ed.2d at 254:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside ...simply because another aggravating circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

This quotation, which constitutes the sum total of the Fourth Circuit's treatment of Zant v. Stephens, was taken out of context, omits important limiting language, and fundamentally distorts this Court's ruling.

2. This Court's Ruling in Zant v. Stephens.

The issue in Zant v. Stephens, as stated by this Court, was:

> [W]hether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld.

77 L.Ed.2d at 241. The Court noted at the outset of its analysis that:

> The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

Id. at 241-242.

Stephens' death sentence had been imposed on the basis of three aggravating circumstances: (1) that Stephens had a "substantial history of serious assaultive criminal convictions"; (2) that the offense was outrageously or wantonly vile, horrible or inhuman; and (3) that the offense was committed by someone who had escaped from custody.

In support of the first circumstance, the State offered evidence concerning Stephens' prior criminal record--two counts of armed robbery, five counts of burglary, and one count of murder.

While Stephens' case was pending in the Georgia Supreme Court, that court ruled that the first aggravating circumstance was fatally vague. When Stephens' case was heard, his death sentence was affirmed by the Georgia Supreme Court on the basis of the two remaining aggravating circumstances.

The Fifth Circuit reversed, concluding that the death penalty was invalid because the jury had based its death sentence in part on an invalid aggravating circumstance. This Court summarized the Fifth Circuit's reasoning as follows:

> The Court of Appeals gave two reasons for that conclusion. First, it read Stromberg v. California, 283 U.S. 359 (1931), as requiring that a jury verdict based on multiple grounds must be set aside if the reviewing court cannot ascertain whether the jury relied on an unconstitutional ground....
>
> Second, it believed that the presence of the invalid circumstance "made it possible for the jury to consider several prior convictions of [respondent] which otherwise would not have been before it." 631 F.2d 397, 405-406 (CA5 1980).
>
> In a petition for rehearing, the State pointed out that the evidence of respondent's prior convictions would have been admissible at the sentencing hearing even if it had not relied on the invalid circumstance. The Court of Appeals then modified its opinion by deleting its reference to the possibility that the jury had relied on inadmissible evidence. It maintained, however, that the reference in the instructions to the invalid circumstance "may have unduly directed the jury's attention to his prior convictions." The court concluded, "It cannot be determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty." 648 F.2d 446 (CA5 1981).

Zant v. Stephens, 77 L.Ed.2d at 244-245.

Because the Fifth Circuit had acknowledged that no inadmissible evidence had been introduced at the sentencing hearing, this Court's reversal of the judgment hinged on two determinations -- that the Fifth Circuit had misunderstood Stromberg, and that the instruction on the improper aggravating circumstance did not materially affect the jury's deliberations.

This Court first analyzed Stromberg, finding two possibilities for error:

> [First,] a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground...
>
> [Second,] the reasoning of Stromberg encompasses a situation in which the general verdict on a single-count indictment or information rested on both a constitutional and an

unconstitutional ground.

Zant v. Stephens, 77 L.Ed.2d at 252-253.

The Court concluded that the second rule applied only to cases in which the punishment was being imposed or heightened because the defendant had exercised his First Amendment rights, and that Georgia's aggravating circumstances did not involve any constitutionally protected activity. Therefore there was no Stromberg infirmity:

> [A] death sentence supported by at least one valid aggravating circumstance need not be set aside under the second Stromberg rule simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty.[6]

Id. at 254. (emphasis added).

Having disposed of the Stromberg issue, the Court went on to consider whether the invalid instruction had a constitutionally prejudicial impact on the jury's deliberations. The Court first noted that the invalid aggravating circumstance pertained to a constitutionally permissible inquiry and that the evidence offered to prove it -- Stephens' record of criminal convictions -- was otherwise admissible under state and federal law. Thus, the alleged constitutional defect arising from the invalid circumstance related solely to the giving of the instruction itself. The question to be decided was whether the emphasis on Stephens' prior record in the invalid instruction amounted to a constitutional defect in the sentencing process. The Court concluded that it did not because an instruction directing the jury to take into account the defendant's prior record would be constitutionally permissible. Moreover, the Court observed, the Georgia Supreme Court had properly concluded that the error had "an inconsequential impact on the jury's decision." Id. at 257.

The Court meant to be taken at its word when it said, at the outset of the relevant portion of the opinion, that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court

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6. The underscored portion of this excerpt was left out of the quotation used by the Fourth Circuit in its opinion.

judgment, the severity of the sentence mandated careful scrutiny in the review of any colorable claim of error." Id. at 255. The Court carefully scrutinized the possible impact of the erroneous instruction to ascertain whether the error was of constitutional magnitude.

The critical factor in the Court's analysis was the essentially unobjectionable nature of the evidence adduced to prove the invalid aggravating circumstance -- Stephens' record of criminal convictions. The Court emphasized that 'the evidence on which the jury might have relied [concerning Stephens' prior record] was properly adduced at the sentencing hearing", id. at 256, and that "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be inappropiate to take account of a defendant's prior criminal record in making sentencing determinations...." Id. at 257. In other words, the Court emphasized that there was no independent constitutional defect in the proceedings. The Court explicitly endorsed the observation of the Georgia Supreme Court that "[a] different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and therefore the circumstance failed." Id. at 258, quoting 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982). Moreover, the Court also noted that counsel for the State of Georgia had acknowledged that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." 77 L.Ed.2d at 256, n.24. Finally, the Court specifically emphasized the limited nature of its holding when it stated that "[w]e need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." Id.

In Michael Smith's case, the jury's finding of an aggravating circumstance and its decision to recommend a death sentence were demonstrably influenced by constitutionally inadmissible evidence. Unlike the instructional error in Zant v.

Stephens, the admission of Dr. Pile's testimony in violation of the Fifth Amendment "can [] fairly be regarded as a constitutional defect in the sentencing process." Id. at 257. Nothing in Zant v. Stephens even remotely suggests that the federal courts should ignore an evidentiary error of independent constitutional magnitude simply because an untainted finding establishes an adequate statutory predicate for a death sentence.

The Fourth Circuit's reading of Zant v. Stephens is both breathtaking in its implications and unprecedented. Under the Fourth Circuit's interpretation, any evidentiary error, no matter how prejudicial in fact, would be regarded as constitutionally harmless unless it tainted every aggravating circumstance.[7] Petitioner has been unable to identify any other case relying upon a similar interpretation. This Court should grant certiorari and reverse this erroneous judgment of the Fourth Circuit.

B. Dr. Pile's Testimony was Inadmissible as Being a Violation of Smith's Fifth Amendment Privilege Against Self-Incrimination.

When the trial judge allowed Dr. Pile's testimony, he was presumably relying on Gibson v. Commonwealth, 216 Va. 412 (1975), under which the testimony was clearly admissible. In that case, Gibson was charged with killing his estranged wife and father-in-law. Several days later he was hospitalized at Central State Hospital for psychiatric treatment and for evaluation of his competency to stand trial and his mental state at the time of the offense. During his evaluation at Central State, he discussed the crime. At his trial, the Commonwealth called a Central State psychiatrist, solely to relate the incriminating

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7. Consider, for example, the error occurring in Estelle v. Smith, 451 U.S. 454 (1981), where psychiatric testimony was unconstitutionally admitted to prove a future dangerousness circumstance identical to that found in the Virginia statute. In Texas, the dangerousness finding is a necessary predicate for a death sentence and is also the vehicle for introduction of mitigating evidence. However, suppose that the facts occurring in Estelle v. Smith had occurred in Virginia -- the same surprise examination without notice to counsel and without any effort to protect Smith's right not to "be made the 'deluded instrument' of his own execution." 451 U.S. at 462. Would this Court have regarded the violation of Smith's Fifth Amendment rights as harmless simply because the jury found both dangerousness and vileness as aggravating circumstances?

statements made by Gibson during the evaluation. The psychiatrist testified, over objection, that Gibson had told him he remembered going to his father-in-law's house and shooting him but that he did not remember anything thereafter. The Virginia Supreme Court upheld Gibson's conviction, stating:

> Whether an accused consents or is required to submit to a psychiatric examination, if during the examination he is not compelled to answer questions concerning the offense with which he is charged, there is no violation of his right against self-incrimination.

216 Va. at 414 (emphasis in original).

In Gibson v. Zahradnick, 581 F.2d 75, 80 (4th Cir. 1978), the Fourth Circuit set aside Gibson's conviction, holding that the admission of the defendant's statements to the psychiatrist violated his Fifth Amendment rights:

> An incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant of the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity [at the time of the offense].

The rationale for the Fourth Circuit's holding in Gibson is that the defendant, especially if he is indigent, cannot adequately explore possible psychological defenses unless the psychiatric examiners are free to make a full inquiry concerning the circumstances of the offense or any prior related offenses. In such cases, counsel must have the benefit of a clinical investigation and assessment before any intelligent decision can be made about pursuing psychiatric defenses. As Judge Haynesworth explained in Gibson:

> Defense counsel had no other choice than to request an examination. His client was in obvious need of a psychiatric examination and psychiatric treatment. Defense counsel would have been subject to censure if he had not done what he did. Exercise of his client's right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of his constitutional privilege against self-incrimination.

Id. Given the need for psychiatric evaluation, Judge Haynesworth emphasized that the evaluation must be conducted under circumstances that will make it worthwhile:

> The Commonwealth and the Defendant may both be in substantial need of expert testimony on the issue of sanity. The most dependable and reliable testimony by psychiatrists would be unobtainable in many cases unless they were free to inquire into the prior aberrant conduct of the defendant, including his participation in the criminal activity with which he is charged.

Id. at 79.

The right to psychiatric evaluation and assistance -- so critically important to the provision of adequate assistance of counsel and a fair balance in the adversary process -- would be altogether nullified if the price of obtaining such an evaluation were a surrender of the defendant's privilege against self-incrimination.[8]

The Fourth Circuit's ruling in Gibson reflects the prevailing doctrine, whether prescribed by statute, court rule or case law, in virtually every state and in the federal courts -- the prosecution may not use any statements made by the defendant during a psychiatric evaluation as proof of guilt, and the defendant's statements are admissible only if the defendant puts his mental conditon in issue by raising a psychiatric defense, and then only on that issue. See, e.g., United States v. Reifsteck, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1052 (3d Cir. 1975). See generally, American Bar Association Standards for Criminal Justice (Mental Health-Criminal Justice Standards), Chapter 7, Standards 7-3.2, 7-3.3, 7-6.4 (1984); Slobogin, "Estelle v. Smith: The Constitutional Contours of The Forensic Evaluation," 31 Emory L.J. 71 (1982).

This Court has not yet held, as did the Fourth Circuit in Gibson v. Zahradnick, that the state may not condition access to mental health assistance on a waiver of Fifth Amendment

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8. This Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), prohibited affirmative prosecutorial use of psychiatric testimony derived from a competency-to-stand-trial evaluation ordered by the court without notice to, or consent by, defense counsel. In that case, the examiner was an agent of the prosecution, and such blatant infringements of the Fifth Amendment will be foreclosed as a result of the Court's holdings that counsel must be notified and the defendant must be warned before any such evaluation is conducted.

privileges,[9] but two recent decisions have recognized the necessity for, and the constitutional right to, assistance to the defendant and his counsel by a mental health professional so that the defense can effectively and intelligently investigate and prepare for trial. Estelle v. Smith, 451 U.S. 454 (1981), effectively bars the prosecution from using pre-trial psychiatric evaluations as an investigative tool in cases in which the defense has not sought an evaluation. Ake v. Oklahoma, ___ U.S. ___ , 84 L.Ed.2d 53 (1985), recognized the indigent defendant's need for access to a competent psychiatric evaluation for the purpose of exploring potential psychiatric defenses.

The Fourth Circuit had no reason to discuss capital sentencing proceedings in Gibson, but the principle recognized in Gibson is directly applicable to the sentencing phase of a capital case. This Court held in Estelle v. Smith that the Fifth Amendment is applicable in capital sentencing proceedings: "We can discern no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63. In a capital sentencing proceeding, the prosecution's proof of its case-in-aggravation is the functional equivalent of its proof of the elements of a criminal offense at the guilt stage. Id. at 466. Moreover, a capital defendant requires access to a psychiatric evaluation and assessment because his case in mitigation will typically rest on a foundation of psychiatric testimony.

In Virginia, in order to establish the evidentiary predicate for the death penalty, the Commonwealth has the burden of proving either of the two aggravating circumstances (future dangerousness or "vileness") beyond a reasonable doubt.

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9. Of course, once the defense decides to raise a psychiatric defense and gives notice of this intent, the prosecution is entitled to have access to the defendant for a psychiatric evaluation. See cases cited in Estelle v. Smith, 451 U.S. at 465-66. However, disclosures made during such an evaluation may be used only to rebut claims raised by the defense, not to prove any unrelated elements of the prosecution's case. See generally, American Bar Association Criminal Justice-Mental Health Standards, Standards 7-3.4, 7-6.4 (1984).

Accordingly, it follows from the constitutional principle recognized in Gibson that the prosecution may not use against a defendant, as part of its case-in-aggravation in a capital sentencing proceeding, any incriminating statements made by the defendant during the course of a psychiatric evaluation; psychiatric evidence obtained during such an evaluation is admissible only if the defendant puts his mental condition in issue to prove mitigating circumstances, and then only on the issues raised, not on any unrelated issues in aggravation.[10] Accord, Battie v. Estelle, 655 F.2d 692, 700 (5th Cir. 1981) (holding that a psychologist's testimony diagnosing defendant as a sociopath likely to follow a violent career was constitutionally inadmissible "where the defense neither requested an examination on future dangerousness nor introduced psychiatric or psychological testimony on that issue"[11]).

In its briefing and argument before the Fourth Circuit, the Commonwealth conceded that the Fifth Amendment precludes the prosecution from introducing, as part of its case-in-chief (to prove a defendant's guilt or to prove aggravating circumstnaces in a capital case) statements elicited from the defendant during

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10. In some cases, the issues may be so intertwined that testimony concerning a mitigating circumstances may also tend to prove an aggravating circumstance, or may open the door to such testimony, but the central constitutional principle recognized in Gibson is that the decision to open the door to psychiatric testimony, in light of its evidentiary risks, should be controlled by the defense. Be that as it may, no such double-edged sword problem was presented in Smith's case. Dr. Pile's testimony was not relevant to any claim in mitigation raised by the defense.

11. In Battie, the Fifth Circuit also pointed out that the examiner, who conducted the evaluation upon defense request, "did not advise Battie of his Fifth Amendment privilege." 655 F.2d at 700. Neither did Dr. Pile in Smith's case. However, for the reasons discussed in the text, this is not the critical variable. Whether or not the defendant is warned, his Fifth Amendment right cannot be "waived" by talking to the psychiatrist, but only by putting his mental condition in issue at trial.

The Commonwealth had also claimed in Gibson that the defendant's disclosures had been voluntary. Judge Haynesworth noted, in response, that Gibson had not been adequately warned in any event but went on to emphasize that such a warning would not have vitiated the constitutional defect in the process: "We do not mean to imply that if a defendant were given a full Miranda warning, an incriminating statement made by the defendant during the ensuing psychiatric examination could be used at trial to prove the defendant's guilt." Id. at 79, n.1.

a psychiatric evaluation conducted for the state. However, the Commonwealth argued that the prosecution is not constitutionally precluded from introducing this same incriminating evidence if the evaluation was conducted at the request of the defense, even if the defendant has not put his mental condition in issue. Apparently, the Commonwealth's theory is either that a defendant waives his Fifth Amendment rights by requesting a psychiatric evaluation and talking to the examiner,[12] or that the Fifth Amendment is not implicated at all when an evaluation is conducted for the defense. The Commonwealth reasons that a defendant who makes incriminating disclosures to an examining psychiatrist has simply "confided to a friend" and "must suffer the consequences if the friend later betrays the confidence" (quoting Conquest v. Mitchell, 618 F.2d 1053, 1056-57 (4th Cir. 1980) (Haynesworth, C.J., concurring).

The central flaw in this reasoning is that a mental health professional conducting a pre-trial forensic examination for the defense in a criminal case is not merely a friend in whom the defendant has chosen to confide. Instead, the examiner is serving an essential constitutional function in assisting the defendant to explore the availability of clinical evidence in exculpation or mitigation. As this Court recently stated in Ake v. Oklahoma, ___ U.S. ___, 84 L.Ed.2d 53, 66 (1985):

> When the state has made the defendant's mental condition relevant to his criminal culpability and to the panishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defenss.

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12. This position was also reflected in the ruling of the state habeas judge who concluded, as he had at trial, that Smith's disclosures were voluntary and that he had waived the protections of the Fifth Amendment privilege by requesting the evaluation and speaking to Dr. Pile:

> [T]he court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

Accordingly, the Court held in Ake that upon a proper showing of need, the state must assure an indigent defendant

> access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.

Id.

As noted above, the defendant's right to have access to a clinical evaluation of his mental condition would be undermined if he were required to sacrifice his privilege against self-incrimination simply by requesting or submitting to the evaluation. Indeed, many courts have held that a psychiatrist who evaluated a criminal defendant at the behest of his attorney is serving as an agent of the attorney, and that disclosures made by the client in that context are protected by the attorney-client privilege just as if they had been made to the attorney heimself or herself. See, e.g., United States v. Alvarez, 519 F.2d 1036, 1045-47 (3rd Cir. 1975). See generally Slobogin, "Estelle v. Smith and the Constitutional Contours of the Forensic Evaluation," 31 Emory L. J. 71, 127-135 (1982).

Ake v. Oklahoma holds that an indigent defendant is entitled to state-subsidized clinical assistance in any case in which a serious question may be raised about his mental condition in exculpation or in mitigation of a death sentence. It seems clear that this evaluation must be conducted within the framework of the attorney-client relationship and that any disclosures made by the defendant to the expert are insulated from disclosure to, or use by, the prosecution, at least until the defendant puts his mental condition in issue.

In its brief in the Fourth Circuit, the Commonwealth relied on Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), where the prosecution called a psychiatrist who had been retained by the defense to testify that the defendant had claimed amnesia concerning the crime. The testimony was introduced to contradict Smith's alibi that he did not commit the murder but was at home "sleeping off a drunk." The Eleventh Circuit ruled that the protections of Estelle v. Smith, 451 U.S. 454 (1981), "do not apply unless the psychiatrist is 'essentially an agent of the

state...'" Id. at 1259. While the Eleventh Circuit was correct in ruling that Miranda warnings are not required in this context, it failed to recognize that the defendant's Fifth and Sixth Amendment interests were nonetheless implicated by the psychiatric evaluation.[13]

In Smith v. Wainwright, the defendant had apparently obtained the psychiatric expert with his own funds. For this reason, the court found it difficult to regard the psychiatrist as an "agent of the state" or to see how the Fifth Amendment was implicated. What the Eleventh Circuit overlooked was that the psychiatrist was the agent of the defense and that the defendant's interest against self-incrimination was subsumed within his Sixth Amendment (and due process) rights to assistance of counsel and to the assistance of experts in exploring available defenses.

Turning to Michael Smith's case, Dr. Pile was appointed by the Court at the request of the defense. However, the relationship was not structured so as to make Dr. Pile an agent of the defense. Instead, it was clear that Dr. Pile's report would be sent to the prosecution and the trial court as well as to the defense. Thus, whether or not Dr. Pile was an "agent of the state" in the usual sense, Smith's privilege against self-incrimination was already at stake in the evaluation. This is what the Fourth Circuit had so explicitly recognized in Gibson v. Zahradnick, 581 F.2d 75, 80 (4th Cir. 1978) when it stated that:

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13. The result in Smith v. Wainwright may be correct, but not for the reasons given by the Court. Disclosures made by a defendant to a psychiatrist retained by (or appointed for) the defense are protected by the Fifth and Sixth Amendments, and the prosecution may not have access to or use the information derived from such evaluations. However, if the defendant puts his mental condition in issue, some courts have ruled that he waives his constitutional protection and that any expert who evaluated him may be called by the prosecution to rebut expert testimony offered in his behalf. See, e.g., Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976); contra, United States v. Alvarez, 519 F.2d 1036, 1046 (3rd Cir. 1975). If accepted, this principle could be extended to permit the prosecution to use information derived from a defense-initiated psychiatric evaluation to impeach his own testimony if he chooses to testify.

> an incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination, and whether it was had for the purpose of determining competency to stand trial or sanity [at the time of the offense]. [Emphasis added]

Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), is virtually identical to Smith's case in this respect. Upon defense motion, the trial court appointed a psychiatrist and psychologist to determine whether Battie was competent to stand trial and whether he was insane at the time of the crime. The psychologist submitted his report to the trial judge. The reports were then sent to the prosecution and the defense. The psychiatrist was not called to testify by either party; however, the psychologist was called by the prosecution at the sentencing phase of Battie's trial to testify that Battie was a sociopath who would continue to pose a danger to society. The Fifth Circuit held that the testimony was constitutionally inadmissible. First, the Court noted, Battie was in the state's custody and the psychologist "had been appointed by the state trial court to conduct the examination and therefore the custodial interrogation was conducted by an agent of the state." Id. at 699-700. Second, the Court concluded that Battie had not waived his Fifth Amendment privilege "by requesting a psychiatric examination to determine his competency to stand trial and his sanity at the time of the commission of the crime." Id. at 700-701. The Court then rejected the state's contention that "a defendant's mere submission to a psychiatric or psychological examination constituted a waiver of the Fifth Amendment privilege."[14]

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14. The Fifth Circuit concluded that Battie was indistinguishable from Estelle v. Smith, notwithstanding the fact that Battie had requested the evaluation. Accordingly, because Battie had not been warned that his disclosures would be used against him, the Court set aside the sentence under Estelle v. Smith. However, it should be clear that the outcome in Battie does not properly turn on whether or not warnings were given. Battie was constitutionally entitled to a psychiatric evaluation; he did not waive his Fifth Amendment rights by requesting or participating in the evaluation; and the prosecution's use of the disclosures would have been constitutionally permissible only if they had been relevant to an issue raised by the defense. Because Battie did not introduce psychiatric or psychological testimony to disprove dangerousness, prosecutorial use of the psychologist's testimony was constitutionally impermissible.

In sum, affirmative prosecutorial use of disclosures made by a defendant during a psychiatric evaluation is constitutionally impermissible. Who requested the evaluation is pertinent only in identifying the constitutional basis for the barrier against prosecutorial use of the psychiatric testimony, not in determining whether the barrier exists. In Smith v. Wainwright, it seems appropriate to characterize the prosecution's use of the defendant's disclosures to the psychiatrist as a violation of the Fifth Amendment. Whatever the characterization, however, the underlying principle is the same -- the defendant needs access to a psychiatric evaluation to defend himself, and his right to defend himself is severely compromised, if not completely undermined, if he must surrender his privilege against self-incrimination as the price for exploring possilbe defenses in exculpation or mitigation.

C. The Record Demonstrates that the Constitutionally Inadmissible Testimony by Dr. Pile Influenced the Jury's Decision to Impose Petitioner's Death Sentence.

Dr. Pile's testimony was demonstrably prejudicial. The prosecution relied on Dr. Pile's description of the school bus incident in its closing argument, to support its claim that Smith would be a continuing threat to society and that a death sentence was necessary to incapacitate him. In addition to the capital offense, Smith had been convicted of a previous rape. The self-admitted incident on the school bus added a third behavioral predicate for the prediction. Instructed by the trial court to return specific factual findings with respect to the aggravating circumstances, the jury found the aggravating circumstance of "dangerousness." Moreover, the jury's questions, both during trial and during its deliberations, demonstrate that the dangerousness issue played a determinative role in its decision to recommend the death penalty. Two jurors interrupted Dr. Dimitris' testimony to ask about the different prognostic implications of Dr. Pile's diagnosis and his own. In addition, the jury suspended its deliberations to return to court and ask the

trial judge to explain the incapacitative consequences of a life sentence.

Dr. Pile's testimony was not merely cumulative. The involuntary confession determined to be harmless beyond a reasonable doubt in Milton v. Wainwright, 407 U.S. 371 (1972), was indeed cumulative -- the prosecution had also introduced two written confessions by the defendant together with statements which he had made when he reconstructed the crime for the police at the scene of its occurrence. This evidence was practically redundant on the same factual issue. In contrast, Dr. Pile's testimony was introduced to provide an additional factual predicate for the prediction of future dangerousness which the jury was urged to make and from which it was urged to infer a need to incapacitate Smith by executing him. Surely in this context it cannot be said that the error was harmless beyond a reasonable doubt.[15]

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found the Petitioner to be "dangerous." However, in light of the prosecution's closing argument and the jurors' questions, the record demonstrates a substantial likelihood that its finding of dangerousness tipped the balance leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the sentence of death was based, to a determinative degree, on its finding of dangerousness, a finding clearly influenced by Dr. Pile's inadmissible testimony.

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15. It is noteworthy that neither Judge Carneal nor the federal magistrate found that this error was not prejudicial.

II

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT AND IN CONNECTION WITH THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL.

Petitioner has raised a number of claims of ineffective assistance of counsel in his Petition for Writ of Habeas Corpus. We have, in effect, abandoned some of the aspects of the claim originally alleged in the Petition, leaving the following allegations of ineffectiveness:

1. Counsel failed to take adequate steps to protect Smith's Fifth Amendment privilege against self-incrimination in connection with statements made during pre-trial psychiatric examinations and subsequently used by the Commonwealth as part of its case-in-aggravation at the sentencing phase.

2. Counsel failed to prepare adequately for cross-examination of Dr. Pile at the sentencing stage, failed to conduct a competent cross-examination, and questioned Dr. Pile in a way which elicited highly prejudicial and unreliable testimony.

3. Counsel failed to conduct an adequate investigation concerning the existence of the mitigating mental abnormalities specified in Va. Code Ann. § 19.2-264.4(B).

A. Petitioner Must Demonstrate That Counsel's Representation Was Not "Within The Range Of Competence Demanded Of Attorneys In Criminal Cases," And That "There Is A Reasonable Probability" That Michael Smith Would Have Received A Life Sentence If Counsel's Performance Had Not Been Constitutionally Defective.

In Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), the Supreme Court reaffirmed and refined the standard for ineffective assistance of counsel first enunciated in McMann v. Richardson, 397 U.S. 759 (1970). Under McMann v. Richardson, the test for effective assistance is whether counsel's performance "was within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770-71.

The record amply demonstrates that Smith's trial counsel performed in a constitutionally deficient manner in the three respects outlined above. In addition, the record shows that counsel's errors were prejudicial even under the demanding

standard articulated by the Supreme Court in Strickland:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

80 L.Ed.2d at 694.

B. Counsel Failed To Protect Smith's Fifth Amendment Privilege Against Self-Incrimination In Connection With Statements Made During Pretrial Psychiatric Examinations And Subsequently Used By The Commonwealth As Part of Its Case-In-Aggravation At The Sentencing Phase Of Trial.

The trial record and the testimony at the evidentiary hearing show that Mr. Pugh made the decision to seek psychiatric evaluation, and advised Smith regarding his conduct during these evaluations. The record also shows that Mr. Pugh never appreciated the serious and patent conflict between his efforts to explore possible psychiatric "defenses," in exculpation or mitigation, and his advice to Smith to remain silent regarding the circumstances of the offense and any prior offense.

Mr. Pugh testified that the circumstances of the offense and Smith's demeanor alerted him immediately to the need for a comprehensive psychiatric evaluation of Smith's personality and mental condition at the time of the alleged offense. He therefore sought the evaluation at Central State Hospital and, dissatisfied with the results of this evaluation, he requested another evaluation by Dr. Pile.

Yet, at the same time, Mr. Pugh said he had advised Smith not to discuss the offense or any prior offenses "with anyone". Although it is not clear whether Mr. Pugh specifically advised Smith to remain silent regarding these possibly incriminating matters before each of the respective examinations, he testified that his general advice had been for Smith to remain silent, and that he did not expect Smith to discuss the offense or prior offenses with either examiner. To be sure that Smith would remain silent, Mr. Pugh should have given him careful and explicit advice immediately prior to the examinations. This was especially true with regard to Dr. Pile's examination, since Mr.

Pugh knew that Smith had been totally open with Dr. Dimitris. Yet Mr. Pugh did not communicate with his client before Dr. Pile's examination, did not accompany him there and did not discuss the matter with Dr. Pile to clarify the purposes and scope of the evaluation.

Most importantly, Mr. Pugh did not recognize the inconsistency between his advice, had it been followed, and his efforts to explore possible psychiatric defenses. He testified at the evidentiary hearing that it had not occurred to him that it is not possible[16] for a psychiatric examiner to render an opinion regarding a person's mental state at the time of an alleged offense if the defendant refuses to discuss the offense at any prior related conduct. Had he realized this, he would undoubtedly have considered seeking a protective order from the court to enable him to investigate possible "defenses"--in exculpation or mitigation--based on psychological abnormality without sacrificing or compromising his client's Fifth Amendment rights. Appreciation of this dilemma, and efforts to resolve it, would be expected as being "within the range of competence demanded of attorneys in criminal cases," McMann, supra, at (770-771), especially in capital cases. Conversely, failure to recognize the problem, and, therefore, to take any steps to resolve it, constitutes an "error so flagrant that a court can conclude that it resulted from neglect or ignorance rather from informed professional deliberation." Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied.

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16. A forensic psychiatrist cannot give an informed opinion about a defendant's mental functioning at the time of an offense if the defendant declines to discuss his recollection about the circumstances before, during and after the offense. Dr. Showalter so testified. See also Gibson v. Zahradnick, supra, at 79. However, an examiner may be able to determine, on the basis of history and a clinical interview, whether or not the defendant exhibits any signs of gross psychopathology. Thus, even if the defendant does not discuss the circumstances of the offense, it may be possible to rule out a mental disease or defect which is prerequisite to assertion of an insanity defense. This was the import of Dr. Dimitris' testimony at the evidentiary hearing. On the other hand, unless the defendant reveals the circumstances of the offense, an examiner will not have enough information on which to base an expert opinion regarding a defendant's actual functioning at the time of the offense. Without such an opinion, a defendant cannot establish a psychiatric case in mitigation under the capital sentencing provisions.

While the state habeas judge and the magistrate both recognized the force of this claim, each concluded that counsel's acknowledged failure to take appropriate action to protect Appellant's Fifth Amendment interest in connection with the psychiatric evaluation was not of constitutional magnitude.[17] Their legal conclusions are patently erroneous, and, as legal conclusions, are entitled to no presumption of correctness under Sumner v. Mata, 449 U.S. 535, 551 (1981).

Counsel's error was obviously prejudicial even under the Strickland standard.[18] The prosecution relied on the evidence in its closing argument, and it contributed substantially to the proof of future dangerousness. Moreover, if Dr. Pile had not been permitted to testify for the prosecution, he would not have testified at all: Appellant's counsel would not then have blundered into disastrous cross-examination.

C. Smith's Trial Attorneys Failed To Prepare Adequately For Cross-Examination Of Dr. Pile At The Sentencing Stage, Failed To Conduct A Competent Cross-Examination, And Questioned Dr. Pile In A Way Which Evoked Highly Prejudicial, Unreliable Testimony.

1. Due to inadequate preparation, counsel's cross-examination of Dr. Pile was clearly incompetent.

At the sentencing hearing, the Commonwealth called Dr. Pile only to ask him about Smith's statements regarding the school bus incident. The Commonwealth's Attorney did not ask Dr. Pile any questions concerning his diagnosis or his prognosis.

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17. Judge Carneal acknowledged that Gibson v. Zahradnick and Smith v. Estelle established the predicate for Appellant's claim: he simply concluded that the premise on which these decisions were based - that an adequate reconstruction of the defendant's mental condition at the time of the offense requires the cooperation of the defendant - was erroneous. Unlike Judge Carneal, the magistrate recognized that counsel's desire for their client to remain silent about the offense and their need to explore psychiatric evidence caught them "in a practical dilemma." However, he concluded, without elaboration, that counsel's failure to do anything to resolve the dilemma was "not ineffective."

18. Neither Judge Carneal nor the magistrate found that this error was not prejudicial.

Had he done so, an adequately prepared defense attorney would have objected to the admission of such testimony on a variety of grounds:

1. Such conclusions, based entirely on Smith's own statements, would violate Appellant's Fifth Amendment rights for the reasons subsequently stated by this Court in Estelle v. Smith, 451 U.S. 454 (1981), and implied by The Fourth Circuit in Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978).

2. Since Smith had offered no psychiatric testimony and had not put his own mental condition in issue, either in mitigation or negation of the aggravating circumstances, the testimony was not relevant. See Estelle v. Smith, 451 U.S. at 466.

3. In light of the unreliability of psychiatric diagnosis of character disorders and the entirely speculative nature of the prediction of future violence, psychiatric opinion testimony is not admissible on this issue.[19]

4. Even if the proffered testimony were not privileged, were relevant and could be the subject of an expert opinion, Dr. Pile would not qualify as an expert to offer such an opinion, because his examination was insufficient and because he was not a forensic psychiatrist.

Perhaps for these reasons, the Commonwealth's Attorney did not ask Dr. Pile about his diagnosis. On cross-examination, however, Mr. Pugh stepped into the shoes of the prosecution:

> Q. Doctor Pile, in your diagnosis what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopath personality, sexual deviation, rape.

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[19] Many courts, most notably the Fifth Circuit in Smith v. Estelle, 602 F.2d 694 (1979), have found that predictions of future dangerousness are so unreliable that they should not be admitted. Id at 699-700, n.7. This Court concluded that such evidence may have some reliability, and therefore there should be no constitutional rule barring such expert testimony. Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1108 (1983). However, it should be noted that Texas furnishes expert assistance to indigent defendants as a matter of right, see 77 L.Ed.2d at 1108, n.5. Both Justice White, writing for the majority, and Justice Blackmun, in dissent, envision a "battle of experts," id. at 1131 (Blackmun, dissenting). The truth-seeking function of the "battle," however, is defeated when defense counsel, through their ignorance, in effect convert "their" expert into the prosecution's most damaging witness.

Q. What is that?

A. A person who--is also described as an antisocial personality. They're all sort of the same type of--of personality disorder. The basically people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of--of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

App. 55-56.

Mr. Pugh knew that Dr. Pile's diagnosis was not supported by an adequate evaluation. Asked at the habeas hearing why he had nonetheless asked Dr. Pile about his diagnosis, Mr. Pugh could offer no explanation.[20]

If Dr. Pile's testimony had been elicited by the prosecution, an adequately prepared defense attorney would have had no difficulty impeaching the witness on cross-examination. Dr. Pile's one-hour interview with Smith, not supplemented by other information, was inadequate to provide the necessary clinical predicate for a diagnosis of antisocial personality disorders. Dr. Showalter and Dr. Dimitris, experts in forensic psychiatry, testified at the evidentiary hearing that the

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[20] In his Findings and Conclusions, Judge Carneal speculates about possible strategic motivations for Mr. Pugh's questioning of Dr. Pile, and suggests that Mr. Pugh may have been attempting to establish that sociopathy constitutes a mitigating mental abnormality under § 19.2-264.4(B) and that this condition was treatable. While this may, indeed, have been Mr. Pugh's strategy, minimally adequate preparation would have revealed that sociopaths do not have compulsions to commit crimes, that the condition is not characterized, clinically, as an emotional illness or sickness, and that the general clinical dictum is that sociopaths are not good candidates for therapy. See Dr. Dimitris' trial testimony, in response to jurors' questions.

It is abundantly clear from the trial record that there was no conceivable value in Dr. Pile's testimony, and that Petitioner's case-in-mitigation had to be built on Dr. Dimitris' testimony. Moreover, Judge Carneal's suggestion that aspects of Dr. Pile's testimony "actually weighted in Petitioner's favor" is wholly inconsistent with the jurors' questioning of Dr. Dimitris, and with the closing argument of the Commonwealth's Attorney.

information available to Dr. Pile was clinically insufficient to support his diagnosis.[21]

Moreover, Dr. Pile's speculative statements about how sociopaths "usually" behave and about the intractability of the condition clearly lack a scientific foundation, as Dr. Showalter testified at the evidentiary hearing:

> [t]here is no valid or reliable study that correlates a diagnostic, any diagnostic entity with specific type of deterioration or any particular types of violent acts or dangers.

The American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual 30 (1974) stated:

> In summary, the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence in unproved. Close monitoring, frequent follow-up, and a willingness to change one's mind about treatment recommendations and dispositions for violent persons, whether within the legal system or without, is the only acceptable practice if the psychiatrist is to play a helpful role in these assessments of dangerousness.

There was ample legal literature available at the time of trial discussing the unreliability of such statements concerning future violence. See, e.g., Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness, 55 Tex.L.Rev. 1343 (1977); Dix, The Death Penalty, Dangerousness, Psychiatric Testimony and Professional Ethics, 5 Am. J. Crim. L. 151 (1977); Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa.L.Rev. 439 (1975). Many more authorities are cited in Smith v. Estelle, 602 F.2d at 699, n.7; many of those authorities would have been available to counsel, had counsel looked.

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21. In his Findings and Conclusions, Judge Carneal stated [App. 73], "As to Petitioner's contention that Dr. Pile's one-hour examination constituted [an] insufficient clinical predicate for his diagnosis, I find that the expert opinion was equivocal and in basic disagreement over this point." Judge Carneal's finding is clearly contrary to the overwhelming weight of the evidence, taken both as a whole and in the context of specific questions which squarely posed the question to the two expert witnesses. It was therefore not entitled to the deference which the magistrate accorded it.

A review of any basic psychiatry text would have exposed the insufficiency of the clinical predicate for Dr. Pile's diagnosis of sociopathy. See, e.g., Winoker and Crowe, Personality Disorders, in 2 Comprehensive Textbook of Psychiatry 1279, 1294 (A. Freedman, et al., eds.)(2d Ed. 1975). However, Mr. Pugh testified that no member of the defense team ever reviewed any psychiatric literature; they did nothing to prepare their cross-examination of the two psychiatrists.

In Smith v. Estelle, 602 F.2d at 701, the Fifth Circuit commented that Dr. Grigson's "surprise" testimony regarding his diagnosis of sociopathy carried "no assurance of reliability whatsoever" because it was not effectively cross-examined (an issue not reached in the Supreme Court's opinion). Thus, the court held that it was error to admit such testimony when offered by the prosecution. It follows, as the district court in Smith v. Estelle observed, that if admitting Dr. Grigson's testimony was not error, defense counsel provided ineffective assistance in failing to impeach it on cross-examination. 455 F. Supp. at 658 n.16. In this case, defense counsel's representation was flagrantly inadequate because they elicited this highly prejudicial, unreliable testimony themselves. Adequately prepared counsel would have asked Dr. Pile no questions at all. Instead, counsel attempted, without any preparation, to cross-examine an expert witness in an area with which he was altogether unfamiliar.

In sum, the decision to cross-examine Dr. Pile without having researched ways to impeach his testimony is itself an error "so flagrant that a court could conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." Marzullo, supra, at 544. Similarly, counsel's decision to "cross-examine" Dr. Pile by asking him exactly those questions which would have been objectionable had they been asked by the Commonwealth's Attorney is a mistake with no possible strategic motivation. It, too, was an error of neglect or ignorance rather than an error of informed, professional deliberation. Counsel's efforts were clearly not within the

range of competence of criminal lawyers, and Michael Smith was denied effective assistance of counsel.

2. Counsel's incompetent cross-examination was demonstrably prejudicial.

The trial record demonstrates clearly that the jury relied on Dr. Pile's testimony and was encouraged to do so by the Commonwealth's Attorney, who emphasized to the jury that defense counsel had himself elicited this damaging testimony.

> Now Dr. Pile was asked, I didn't ask him. All I asked him was about the acts that were committed on the bus. Mr. Wood and Mr. Pugh asked him about his diagnosis. Certainly Dr. Pile and Dr. Dimitris agreed on the diagnosis. I didn't ask Dr. Pile what his diagnosis was, they did...

The Commonwealth's Attorney cited Dr. Pile's testimony, and argued that this evidence would be enough, on its own, to warrant imposition of the death penalty.

The jury was obviously extremely interested in the different prognostic implication of the diagnoses of inadequate personality and sociopathic personality: Juror Renz and Juror Robertson interrupted Dr. Dimitris' testimony to ask about the diagnoses. This demonstrated interest strongly suggested that Dr. Pile's unreliable diagnosis, incompetently elicited by defense counsel on cross-examination, played a determinative role in the jury's deliberations. Instructed by the court to return specific factual findings with respect to the statutory aggravating circumstances, the jury clearly found the aggravating circumstance of "dangerousness." This is clear because the jury did not strike out dangerousness on the verdict form, even though it did delete the circumstance of "depravity of mind". Also, the persistent questions from the jurors during the hearing and during the deliberations (regarding the incapacitative consequences of a life sentence) demonstrate that the dangerousness factor also played a conclusive role in the jury's decision "to recommend" the death penalty.

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found Smith "dangerous." However, in light of the prosecution's closing argument and the jurors' questions, this Court must assume, at

the least, that its findings of dangerousness tipped the balance leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the sentence of death was based, to a determinative degree, on its finding of dangerousness, a finding clearly influenced by Dr. Pile's unreliable testimony. There is a "reasonable probability" that, but for counsel's incompetent cross-examination of Dr. Pile, the results of the proceeding would have been different. Strickland v. Washington, 80 L.Ed.2d at 694.

D. Counsel Failed To Conduct An Adequate Investigation Concerning The Only Available "Defense" In The Capital Sentencing Phase Of His Trial--Whether Smith Suffered From Mitigating Mental Abnormalities As Set Forth In Va. Code Ann. § 19.2-264.4(B).

In most capital cases, the defendant's sole "defenses" at the capital sentencing phase of this trial are likely to be the mitigating mental abnormalities defined in Va. Code Ann. § 19.2-264.4(B). The threshold of clinical and legal significance of mitigating mental abnormality is much lower in this context than it is for legal insanity under the M'Naghten and irresistible impulse rules. Neither of the two mitigating circumstances specified in the statute requires a "mental disease or defect":

> 1. Whether "the capital felony was committed under the influence of extreme or emotional disturbance"; or
>
> 2. "Whether, at the time of the commisison of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired."

These two clinical questions, based on the American Law Institute's Model Penal Code, § 210.6 (Official Draft 1962), have no parallel in any other area of the criminal law in Virginia.

Recognizing the need for psychiatric testimony in mitigation, trial counsel arranged for two psychiatric evaluations, first by the Forensic Unit at Central State Hospital and then by Dr. Wendell Pile. However, neither examiner was requested, by the court or counsel, to address these two key questions arising under the capital sentencing statute.

The staff at Central State was initially ordered to evaluate only Smith's competency to stand trial; upon written request of the Commonwealth's Attorney and verbal request of defense counsel, Dr. Dimitris also expressed an opinion regarding his sanity at the time of the offense. Dr. Dimitris and Mr. Pugh both testified that the provisions of the capital sentencing statute were not brought to Dr. Dimitris' attention until the day of the sentencing trial, and even then the focus was on dangerousness, and not mitigation.

By court order dated September 28, 1977, Dr. Pile was requested to evaluate Smith's "mental condition...at the time of the alleged offense and his mental condition at the time of the examination." Dr. Pile and Mr. Pugh both testified that neither defense counsel discussed the purpose of the evaluation with him at any time, either before or after the October 1 examination. Dr. Pile also testified that the provisions of the capital sentencing statute were never brought to his attention.

Dr. Showalter testified that, in order to develop an expert opinion on these mitigating mental abnormalities, a clinician must conduct a more extensive evaluation than that required to determine sanity or competency. By their failure to request either psychiatric examiner to direct his clinical attention to the statutory mitigating abnormalities, counsel made it impossible to investigate and prepare a case in mitigation, compromising Appellant's right to explore and present a "defense" based on mental abnormality. A competent attorney "must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed..." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968).[22]

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22. In Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978), Judge Haynesworth stated that the defendant's Sixth Amendment right to effective assistance imposes a

> correlative duty on defense counsel to undertake reasonable steps to investigate all open avenues of defense. The circumstances [here] clearly suggested that an exploration of his mental condition was such an avenue.

See also Brennan v. Blankenship, 472 F. Supp. 149 (W.D.Va. 1979).

As both Dr. Showalter and Dr. Dimitris noted, the subtle distinctions of the statute require a more detailed and more sophisticated examination than that normally conducted to determine whether the defendant is legally insane. The symptomatology of one who is legally insane is rarely subtle, particularly as the standard is defined in Virginia. Most psychiatrists and attorneys believe that the defendant must be psychotic (grossly out of touch with reality) to be legally insane. Goldstein, The Insanity Defense 69 (1967). Thompson v. Commonwealth, 193 Va. 704 (1952); David v. Commonwealth, 214 Va. 681 (1974).

In this case, neither examiner was requested to focus his attention on the range of psychological factors that might be relevant to the existence of extreme emotional disturbance or to any non-psychotic impairment of Smith's ability to conform his conduct to the requirements of the law.

It is clear from the record that neither examiner did so. Counsel had not discussed the meaning of those mitigating factors, which were concepts that were unknown to the psychiatrists. In fact Dr. Pile testified at the evidentiary hearing that he believed that the mitigating circumstances under the capital sentencing statute were interchangeable with the M'Naghten inquiry. He had never been told otherwise.

While each examiner formed a diagnosis, neither conducted a sufficient examination concerning Smith's mental functioning at the time of the offense to address the statutory mitigating circumstances. The fault lies with counsel. It is not enough to obtain a psychiatric evaluation; counsel must tell the expert what issues to evaluate. Counsel failed to do so.

E. Counsel's Mistakes Reflect A Systematic Failure To Understand The Practical And Legal Context Of Psychiatric Participation In A Capital Sentencing Proceeding.

Each of the three deficiencies of counsel's performance identified above is an independent and sufficient denial of effective assistance under Strickland v. Washington. Taken together, however, the prayer for relief becomes more compelling.

It was clear from the outset that the only real issue in the case was punishment, and that a successful defense would

have to be based on psychiatric testimony. However, psychiatric evaluations in capital cases present a series of complicated problems, which defense counsel completely failed to appreciate. Counsel failed to understand either the practical or legal aspects of a pre-trial psychiatric evaluation. Counsel failed to focus on the substantive significance of clinical evidence in the new capital sentencing scheme, and failed to take adequate steps to develop a clinical case in mitigation. Counsel did not understand the purposes, significance and limitations of psychiatric evidence, and therefore completely mishandled the expert testimony at trial. On all of these issues, counsel failed to do adequate research and preparation.

This court has recently recognized, in Estelle v. Smith, 451 U.S. 454 (1981), and Ake v. Oklahoma, ___ U.S. ___, 84 L.Ed.2d 53 (1985), the often critical role that psychiatry and psychiatric evidence may play in capital sentencing procedure. In Ake in particular, this court noted that defense counsel can only be effective in investigating, preparing, and presenting psychiatric evidence when counsel has access to the substantive knowledge of psychiatry sufficient to understand the complexities of that field. In Ake, this court recognized that, in some cases at least, the need for access to substantive psychiatric knowledge may be so great as to make it a constitutional requirement that a psychiatrist be appointed to assist defense counsel in the evaluation and preparation of the case, as well as merely in the presentation of evidence. Psychiatrists, in their role as defense experts,

> gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affect his behavior at the time in question. They know the probative questions to ask of the opposing parties psychiatrist and how to interpret their answers.

Ake, 84 L.Ed.2d at 64. (Emphasis added).

Of course, in this case Dr. Pile was appointed not as the "defense expert" envisioned under Ake, but rather as the court's expert. David Pugh did not have access to a psychiatrist in the way envisioned by Ake -- for consultation, advice, and deliberations on stratogy. He did not have access to a psychiatrist for the purpose of educating himself, a role which this court clearly envisioned in Ake. Unfortunately, Mr. Pugh also did not fill the void in his knowledge by any other means -- by contacting a psychiatrist on his own, by reading psychiatric texts, or by doing anything else to acquaint himself with the underlying substantive knowledge necessary to effectively investigate, prepare and present a case. Most importantly, he did not acquire the knowledge necessary to cross-examine Dr. Pile, or to do what the well-prepared defense lawyer would have done -- to sit down, with no cross-examination.

This Court has acknowledged the need for counsel to be well informed on psychiatric issues in capital cases. Even though this Court had not recognized a constitutional right to a defense consultant, the need was still there. Without a defense consultant, it was all the more important that defense counsel find other ways to acquire the substantive knowledge to conduct the defense. Counsel did not do so, a failure which fell outside the "range of competence demanded of attorneys" in similar cases, and a failure which clearly caused prejudice to Michael Smith.

In failing to adequately investigate a case-in-mitigation based on mitigating mental abnormality, as defined by § 19.2-264.4 (B), counsel failed to perform adequately one of the absolutely essential tasks in the representation of a defendant charged with a capital offense and, hence, fell outside the "range of comptence demanded of attorneys" in similar cases.

III

THE JURY INSTRUCTIONS AT THE SENTENCING PHASE OF PETITIGNER'S TRIAL WERE CONSTITUTIONALLY DEFECTIVE BECAUSE THEY COMPROMISED HIS RIGHT TO AN INDIVIDUALIZED DETERMINATION THAT DEATH WAS THE APPROPRIATE PUNISHMENT IN HIS CASE.

The trial court gave two instructions to the jury at the sentencing phase of Smith's trial. The first, Instruction 1,

was the general instruction; the second, Instruction A, concerned specific mitigating circumstances. Instruction 1 stated:

> The Court instructs the jury that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt that:
>
> 1. [The dangerousness circumstance]; or
>
> 2. [The vileness circumstance]:
>
> You may fix his punishment at death.
>
> If you find that the Commonwealth has failed to prove either (1) or (2) above beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment.

The first portion of Instruction 1 appears to direct the jury not to impose the death penalty unless it finds one of the aggravating circumstances specified by statute. The constitutional defect in the instruction lies in its final paragraph, which was presumably designed to tell the jury what to do *if* it finds an aggravating circumstance.

The instruction explicitly states that the jury is *permitted* to impose a life sentence if the Commonwealth fails to prove an aggravating circumstance or if the jury finds a superseding mitigating circumstance [i.e., a mitigating circumstance which does not "justify" a death sentence][23]. The instruction provides no express guidance to the jury as to what it should do if it finds an aggravating circumstance and no superseding mitigating circumstance. However, the instruction clearly implies that the jury is required to impose a death sentence in such a case. In essence, the overall effect of the instruction is as follows:

> You may fix the defendant's punishment at life imprisonment if the Commonwealth has failed to prove [either of the aggravating

---

23. What obviously was meant was that the jury is *required* to impose a life sentence if it finds no aggravating circumstances or if it finds superseding mitigating circumstances. A literal reading of the instruction, as given, would permit the jury to impose a death sentence even if the prosecution failed to prove the aggravating circumstances.

> circumstances] or if you find that [the] mitigating circumstances overcome the aggravating circumstances. Otherwise, you shall impose a death sentence.

The effect of this instruction is to estblish a presumption in favor of a death sentence upon proof of an aggravating circumstance. The instruction implies that the evidence in mitigation must rise to some particular, but unspecified, level of significance to "justify" a life sentence. As a result, the jury would be required to impose a death sentence if it found no mitigating circumstances or if it determined that the statutory mitigating circumstances did not override the presumption. Specifically, the jury would be precluded from determining, based on all the circumstances, that death was not an appropriate sentence in Smith's case. Thus, the instruction places a thumb on the death side of the scales, requiring the defendant to bear the burden of overcoming this presumptive judgment.

Even if Instruction 1 does not establish the presumptive desirability of a death sentence, it is so confusing as to leave the jury uncertain of its obligations. It does not give the jury adequate and specific guidance regarding its prerogative to return a life sentence if it were to find an aggravating circumstance without any superseding mitigating circumstance. Smith had requested an instruction -- Instruction B -- that would have made this clear, but the requested instruction was refused.[24] Virginia law clearly permits the jury to impose a life sentence in such a case, Smith v. Commonwealth, 219 Va. at 480, yet the jury was not so advised at Smith's own trial.

On direct appeal of Smith's death sentence, the Virginia Supreme Court considered arguments raised on Smith's behalf that the sentencing phase instructions were constitutionally defective. Smith v. Commonwealth, 219 Va. at 479-80. While conceding that the instructions were not "artfully drawn", the Virginia Supreme Court held that when "read as a whole," the

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24. Instruction B would have specifically informed the jury that "even though you may find [either of the aggravating circumstances], after considering mitigating circumstances, you may fix his punishment at life imprisonment."

instructions "fairly expound the thrust of the statute" and were not inconsistent with the decisions of this Court. 219 Va. at 480.

Whether Instruction 1 in fact created a presumption in favor of death or simply left the jury wallowing about, unguided, the instructions compromised Smith's Eighth Amendment right to an individualized determination that death is the appropriate penalty in his case. Lockett v. Ohio, 438 U.S. 586, 601 (1978).

The Fourth Circuit's rulings to the contrary, in Petitioner's case and in its earlier decision in James Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), reflect a fundamental misunderstanding of this Court's decision in Zant v. Stephens and a failure to recognize the continuing significance of the principle of individualization in Eighth Amendment jurisprudence.

A. The Principle of Individualization is the Overriding Constitutional Imperative in Capital Sentencing Proceedings Under Statutes Which Have Genuinely Narrowed the Class of Offenses Punishable by Death.

Since this Court's watershed decision in Furman v. Georgia, 408 U.S. 238 (1972), it has struggled to reconcile two constitutional imperatives in capital sentencing. In Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983), this Court made clear that two constitutional principles -- and individualization -- govern capital sentencing procedures. The narrowing principle requires states to reduce the risk of arbitrariness by creating a statutory scheme which "genuinely narrows the class" of death-eligible offenders to those whose offenses "reasonably justify" the imposition of the death penalty. 77 L.Ed.2d at 249.

Once the defendant has been deemed to be in the class of people eligible for the death penalty, "what is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." 77 L.Ed.2d at 251.

The Fourth Circuit has interpreted Zant v. Stephens as a signal to the federal courts to refrain from engaging in "detailed scrutiny of state jury instructions on collateral review." James Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), cited

by the panel which decided Smith's case as "controlling authority," prohibiting federal court review of the jury instructions in this case. Petitioner respectfully contends that the Fourth Circuit has read too much into Zant v. Stephens. This Court did not mean to erase the basis for constitutional scrutiny of state sentencing decisions at the selection phase. To the contrary, the Court specifically reaffirmed the principle of individualization underlying Lockett and Eddings. Zant held only that a state may constitutionally leave the "ultimate" decision to the unfettered discretion of the jury: this Court's Eighth Amendment jurisprudence, from Woodson v. North Carolina, 428 U.S. 280 (1976), to Zant v. Stephens, holds that a state must provide a substantial measure of jury discretion.

B. Jury Instructions Which Fail to Inform the Jury of its Prerogative to Return a Life Sentence Even if it Finds One or More Aggravating Circumstances Which Establish a Presumption in Favor of the Death Penalty and Which Failed to Direct the Jury to Compare a Death Sentence Only if Such a Sentence Was Justified and Appropriate Under All of the Circumstances are Constitutionally Defective.

In James Briley v. Bass, supra, the Fourth Circuit implied that the constitutional requirement of individualization is satisfied so long as jury instructions do "not render the death sentence in any way mandatory or preclude consideration of any relevant mitigating evidence." 750 F.2d at 1245. This interpretation unduly circumscribes the principle underlying Lockett and Eddings.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), this Court announced that individualization is a constitutional imperative in capital sentencing proceedings:

> The fundamental respect for humanity underlying the Eighth Amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

The Court struck down mandatory statutes in Woodson, in Roberts v. Louisiana, 428 U.S. 325 (1976) (Roberts I), and Roberts v. Louisiana, 431 U.S. 633 (1977) (Roberts II). Elaborating further on the principle in Lockett v. Ohio, 438 U.S. 586 (1978), and

Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court has made clear that the jury's prerogative to impose a life sentence -- whether for a particular reason or for no reason at all -- must not be infringed.

Eddings is a natural extension of Woodson, Roberts I, Roberts II and Lockett. Woodson and Roberts I held that a state may not determine, ex ante, that death is the appropriate penalty for all offenders within a broadly defined death-eligible class. Roberts II held that the legislature may not determine, ex ante, even for a narrowly circumscribed class of offenses (the killing of a police officer), that no claim in mitigation could outweigh the aggravated character of the offense. Lockett held that a state may not determine, ex ante, that only some types of mitigating claims are compelling enough to warrant leniency. Eddings would seem to stand for the proposition that the state may not determine, ex ante, the weight which should be given to particular circumstances of a case, whether aggravating or mitigating. Such normative constraints, especially those which devalue claims raised by a defendant in support of leniency, must be avoided.

In an important line of cases concerning the Georgia statute, the Fifth and Eleventh Circuits have considered the implications of Lockett and Eddings for jury instructions on mitigation. The leading case is Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982), in which the Court invalidated instructions which failed to "clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Id. at 471 (footnote omitted). The Court relied on Lockett, reasoning that "this constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision." Id. at 470, quoting Chenault v. Stynchcombe, 581 F.2d. 444 (5th Cir. 1978).

Since this Court's decision in Zant v. Stephens, the Eleventh Circuit has reaffirmed the Spivey doctrine, concluding

that the cases decided thereunder require the trial court to: "(1) instruct the jury that it must consider mitigating evidence, (2) define mitigating factors and explain their function in sentencing deliberations,[25] and (3) inform the jurors that a finding of aggravating circumstances does not require them to return a death sentence." William Tucker v. Zant, 724 F.2d. 882, 891 (11th Cir. 1984), vacated and reversed en banc on other grounds, 762 F.2d 1480 (1985). The Spivey doctrine effectuates the Lockett principle by "communicat[ing] to the jury that the law recognizes the existence" of mitigating circumstances, Spivey at 472, and authorizes the jury to exercise its prerogative to determine if the death sentence is appropriate in the case at hand.

In James Briley v. Bass, supra, the Fourth Circuit implied that Zant v. Stephens had effectively overruled Spivey.[26] Petitioner respectfully disagrees. The Lockett principle cannot be reasonably limited, as the Fourth Circuit suggested, to a right to present mitigating evidence and a ban on mandatory death penalties. Eddings makes it clear that the principle also precludes the state from adopting any normative constraint on the sentencer's discretion which tips the scales toward a death

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25. The Court repeated the Spivey definition of mitigating circumstances as those that "do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment." Id., quoting Spivey v. Zant, 661 F.2d at 471 n.8.

26. This is also the view of the Georgia Supreme Court. Ross v. State 254 Ga. 22, 326 S.E.2d 194, 203-204 (1985) (quoting Briley v. Bass). Significantly, in several cases since Zant v. Stephens, the Eleventh Circuit has continued to apply the Spivey doctrine without so much as a footnote to indicate any possible inconsistency with that decision. In Tucker v. Zant, 724 F.2d 882, 890-92 (11th Cir. 1984), heard en banc and vacated on other grounds, 762 F.2d 1480 (1985); Drake v. Francis, 727 F.2d. 990, 1000 (11th Cir. 1984), vacated on rehearing en banc, 762 F.2d 1449 (1985) (approving the panel opinion on this issue, 762 F.2d at 1451); Collins v. Francis, 728 F.2d 1322, 1342-43 (11th Cir. 1984); Moore v. Zant, 722 F.2d 640, 646-47 (11th Cir. 1983), opinion en banc, 738 F.2d 1126 (11th Cir. 1984); Johnson v. Kemp, 585 F.Supp. 1496, 1508 (S.D.Ga. 1984); and Prejean v. Blackburn, 570 F.Supp. 985, 993-95 (W.D.La. 1983), the courts carefuly examined jury charges in light of the Spivey principles and found the charges adequate. In Finney v. Zant, 709 F.2d 643 (11th Cir. 1983); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Dix v. Newsome, 584 F.Supp. 1052 (N.D.Ga. 1984); and Ruffin v. Zant, 591 F.Supp. 1136 (S.D.Ga. 1984), the courts examined jury charges under Spivey and its progeny, found the charges constitutionally inadequate, and granted habeas relief.

sentence. For example, an instruction directing the jury to impose a death sentence on a defendant who killed a police officer unless the evidence in mitigation was "overwhelming" would be unconstitutional because it would, in effect, place a heavy weight on the side of death and devalue any claim which could be raised in mitigation.

In summary, a state is constitutionally precluded from imposing any normative constraint on the selection process which unduly compromises the defendant's right to an individualized determination of the suitability of death sentence in his case. Moreover, the state is constitutionally obligated to assure that the sentencer gives adequate weight to any claim offered by the defendant in support of a life sentence. These principles were violated by the instructions given in Petitioner's case.

Justice Stevens has recognized the Lockett problem presented in instructions, such as those given in Petitioner's case, that create a presumption in favor of the death penalty and thereby constrain the jury's discretion to recommend a life sentence. He recently commented on instructions, given pursuant to the North Carolina statute, which charged the jury that it had a duty to impose the death penalty if it found, inter alia, (1) that the aggravating circumstances were sufficient to impose the penalty of death, and (2) that the aggravating circumstances outweighed the mitigating circumstances:

> It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leave it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "'death is the appropriate punishment in a specific case.'" Lockett, 438 U.S. at 601 (plurality opinion), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, J.J.).

Smith v. North Carolina, 459 U.S. 1056, 1057 (1983) (opinion of Justice Stevens respecting the denial of certiorari.) To give the jury a broader measure of discretion, Justice Stevens recommended that North Carolina juries be instructed to determine

beyond a reasonable doubt whether "the imposition of the death penalty is justified and appropriate in the circumstances." Id. quoting State v. Wood, 648 P.2d 71, 83 (Utah, 1982). In State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, 327-28 (1983), the North Carolina Supreme Court adopted Justice Stevens' suggestions.[27]

In order to offer the fullest assurance that "death is the appropriate punishment in a specific case," Lockett, 438 U.S. at 601, a state may not establish a presumption in favor of death or otherwise constrain the jury's prerogative to decide, in light of all the circumstances, to return a life sentence.[28] This principle was violated in Petitioner's case.

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27. See also Justice Marshall's dissent from denial of certiorari in Jones v. Illinois, ___ U.S. ___, 78 L.Ed.2d 264 (1983), in which he expressed doubts about the constitutionality of a provision of the Illinois statute which requires that the death penalty be imposed if aggravating factors are found and "there are no mitigating factors sufficient to preclude the imposition of the death sentence." He observed that the instructions in Jones "may well have led the sentencing jury to conduct its deliberations under the assumption that petitioner had the burden of proving that the death penalty was inappropriate in his particular case." Justice Marshall concluded that he did "not understand this court's precedents to permit the placing of such a burden on a defendant."

28. It can be argued that the state should be required to establish a presumption in favor of life and that juries should be instructed in the following manner:

You should carefully consider the evidence presented by the defendant and should give the circumstances in mitigation whatever weight you believe appropriate. Even if you have found that one or both aggravating circumstances exist, you may fix the defendant's punishment at life imprisonment. You should not recommend the penalty of death unless you determine that it is the only appropriate penalty under all the circumstances of this case.

Even if the Eighth Amendment does not require a presumption in favor of a life sentence, the instruction given in Petitioner's case is constitutionally forbidden.

CONCLUSION

The Fourth Circuit's major error in handling this case was to grossly distort this courts ruling in Zant v. Stephens. This distortion occurred in two different regards. The first distortion lead to the Fourth Circuit's deciding to ignore fundamental constitutional errors; the second distortion led to the Fourth Circuit's simply deciding the jury instruction issue incorrectly.

The easiest way for this Court to handle this case would be to simply remand the case to the Fourth Circuit with instructions to apply Zant v. Stephens as this court wrote it, not as subsequently interpreted by the Fourth Circuit. If the case were remanded to the Fourth Circuit with instructions to reach the merits of the issues, this case would be in a much better posture for full consideration by this Court.

If, on the other hand, this Court is not uncomfortable with the fact that the Fourth Circuit made no rulings on some of these underlying issues, and if this Court feels that the issues are ripe for determination, Petitioner prays this Court to grant certiorari as to all issues and to hear all of the issues on their merits.

MICHAEL MARNELL SMITH

By Counsel

J. Lloyd Snook, III
230 Court Square
Charlottesville, Virginia 22901

Richard J. Bonnie
917 Rugby Road
Charlottesville, Virginia 22903

EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-4001

Michael Marnell Smith,

Appellant,

versus

Raymond K. Procunier,
Director of the Department of
Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Widener and Judge Warriner, United States District Judge sitting by designation.

For the Court.

CLERK

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6001

Michael Harnell Smith

Appellant,

versus

Raymond K. Procunier, Director
of the Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, Chief Judge. (CA 82-484-N)

Argued: April 5, 1985 Decided: May 10, 1985

Before WIDENER and HARNAGHAN, Circuit Judges, and WARRINER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Richard Bonnie (J. Lloyd Snook, III; Paxson, Smith, Gillian & Scott; Richard J. Bonnie on brief) for Appellant; James E. Kulp, Senior Assistant Attorney General (Gerald L. Baliles, Attorney General on brief) for Appellee.

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[redacted], Circuit Judge.

It has not infrequently been observed that there must be a better, more expeditious, way for dealing with cases which present the most stressful and distressful decisions with which a judge or panel of judges may be faced, namely, those involving appeals from denials of habeas corpus relief to criminal defendants convicted and sentenced to die. The offense here occurred on May 23, 1977. Michael Darnell Smith was convicted by a jury in James City County, Virginia on November 2, 1977 for the capital murder and rape of a young woman. On the following day, November 3, 1977, the jury heard evidence at the penalty/sentencing phase and recommended a sentence of death. In doing so, the jury had before it the Commonwealth's claim that there were two separate aggravating circumstances, one of dangerousness, the other of vileness. The jury found separately, with respect to each aggravating circumstance, that it alone merited imposition of the death penalty.

There followed the usual panoply of legal maneuvers:

1. An automatic appeal to the Supreme Court of Virginia, which affirmed the conviction and the death sentence. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

2. A denial by the Supreme Court of the United States of a petition for a writ of certiorari. Smith v. Virginia, 441 U.S. 967 (1979).

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3. A denial of a state court petition for writ of habeas corpus on March 14, 1980 following an evidentiary hearing on Smith's claim that there had been ineffective assistance of counsel.

4. The filing, on June 28, 1982, of a petition in the United States District Court for the Eastern District of Virginia for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. A magistrate issued a written report proposing dismissal of the petition. On December 4, 1984 the district court did so.

Now, on appeal, the case reaches us on the following issues:

1. Whether a Fifth Amendment violation occurred when a psychiatrist, consulted at the instance of Smith's counsel, was wrongly permitted to testify in the sentencing phase of the case about incriminating statements concerning an earlier attack Smith described during the psychiatric interview.

2. Whether the assistance of counsel representing Smith at the sentencing phase was ineffective.

3. Whether jury instructions at the sentencing phase unconstitutionally compromised Smith's right to an individualized determination that death was the appropriate punishment.

It is evident that guilt is not contested. Smith questions solely the correctness of the sentencing procedures.

At the outset we are confronted with a contention by

the Commonwealth that the absence of an objection by counsel to the psychiatric testimony under Wainwright v. Sykes, 433 U.S. 72 (1977) foreclosed the making of the point. The case imposes a burden on the convict to show cause for and prejudice in the failure to raise the issue.

That question under Wainwright v. Sykes has plagued the Court in prior instances. Potentially it could do so here for there is reason to doubt whether counsel for Smith could muster sufficient reason to constitute trial counsel's failure to object inexcusable neglect. The testimony of a psychiatrist whose interview with Smith took place through the initial urging of defense counsel was under Virginia law proper, even though his testimony was severely damaging to the defendant. Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975). At the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November 1977, was not certain. Only subsequently, in Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978), did the Fourth Circuit establish the impropriety on Fifth Amendment grounds of testimony concerning damaging remarks of the accused during a psychiatric examination.[1]

One difficulty is presented by the case of Honeycutt v.

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1 That is not to say, however, that there were not indicia of things to come which antedated the trial of Smith. E.g., United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Gibson v. Zahradnick, supra, at 78-79.

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Mahoney, 698 F.2d 213 (4th Cir. 1983). There it was held that a lawyer could not be found to have afforded ineffective assistance where in October 1973 he failed to object to imposition on the defendant of the burden of proof. That the imposition was, indeed, improper was finally established by the Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975). The Supreme Court's decision came down two years after the trial had taken place. However, both the district court on September 29, 1972 and the decision of the First Circuit Court of Appeals on February 14, 1973 had announced the same rule of law, subsequently adopted by the Supreme Court, before trial took place in October 1973.[2]

Rather than take such an approach here, however, especially inasmuch as the continued vitality of Honeycutt v. Mahoney has been rendered uncertain by the recent decision of Reed v. Ross, ____ U.S. ____, 82 L.Ed.2d 1, 52 U.S.L.W. 4905 (1984), we give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue raised on the merits.[3] Since our determination on the merits is that Smith is not entitled to habeas corpus relief, we thereby, without displaying

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2 Wilbur v. Robbins, 349 F. Supp. 149 (S.D. Me. 1972); Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973).

3 See Hutchins v. Woodard, 730 F.2d 953, 959 (4th Cir. 1984).

substantial disregard for Wainwright v. Sykes, at least, avoid the nagging concern that one possibly meritorious grounds for avoiding the termination of Smith's life went unconsidered. Cf. Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), holding that ignorance or oversight leading to the failure to raise a point on behalf of a criminal defendant may constitute cause sufficient to excuse failure to make a contemporaneous objection.[4]

On the merits, we immediately come up against the consideration that the jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (i.e., violence) and (b) vileness.[5] The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to

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4 At the same time, we feel it only fair to counsel who represented Smith to point out that the question is very clouded as to whether the representation he afforded his client was, in fact, ineffective or that any prejudice resulted. See Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984).

5 In the jury's verdict, the chameleon word "or" separates the finding of "probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society" from "his conduct in committing the offense is outrageously or wantonly vile." Any possible ambiguity is removed for us, however, by the determination of the Supreme Court of Virginia that "[t]he written verdict recited a finding of both aggravating circumstances." Smith v. Commonwealth, 219 Va. 455, 481, 248 S.E.2d 135, 151 (1978). Cf. Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984) where "shall" from the context was read as "may." Similarly, the context removes any doubt that "or" meant, and was understood to mean, "and."

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the question of "dangerousness."[6] The evidence presented to the jury supporting a showing of "vileness" was unchallenged. The testimony in the guilt phase of the case amply provided a basis for a decision that the crime was vile.[7] Having met the victim on a beach, Smith paused to help remove briars from her feet. The appearance of kindness immediately dissipated when Smith grasped the victim's arm, took her to a wooded area, produced a knife, and told her to undress. He then forced her to have intercourse and, following that, choked her, dragged her into the water, submerged her head, stabbed her, and left the dead victim lying where she fell. The immediate cause of death was drowning, although the testimony indicated that stab wounds and strangulation also could have been responsible.

This court recently decided in Briley v. Bass, 742 F.2d 155, 165 (4th Cir. 1984), that any one aggravating circumstance deemed sufficient by the jury suffices:

> [S]ince the jury returned a verdict finding the death sentence warranted under both the "vileness" and the "dangerousness" standard, it is of no importance whether the instruction on "vileness" was correct so long as the instruction on "dangerousness" was correct, provided, of course, the verdict of the jury was unanimous on the "dangerousness

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6 The psychiatrist testified that Smith volunteered information that at some time prior to the incident for which he here stood convicted he assaulted a girl on a school bus.

7 In his instruction, the trial judge defined vile as torture, depravity of mind or aggravated battery to the victim.

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ground."

Similarly, the Supreme Court in Yant v. Stephens, 462 U.S. 862, 884 (1983) stated that

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravated circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

The effort is also made to depict Smith's trial counsel as ineffective for failure, having once elicited testimony that Smith was a sociopathic personality, subject to sexual deviation, to explore with two psychiatrists who testified the possibility that Smith suffered from a potentially mitigating mental incapacity. First, inquiry into the area meant resort to a double-edged sword, requiring the application of professional judgment whether to pursue a subject that already had proved unproductive. Second, counsel's professional wisdom in deciding not to do so was borne out because both psychiatrists have (at the state habeas corpus hearing) indicated that, had they been asked an opinion as to whether Smith suffered from a potentially mitigating mental incapacity, the answer in each case would have been negative.

Finally Smith's constitutional challenge to jury instructions at the sentencing phase as having deprived him of his Eighth Amendment right to an individualized determination that death was the appropriate penalty, see Lockett v. Ohio, 438 U.S.

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596, 605 (1978), runs up against contrary authority which is controlling. The constitutionality of the instructions of which Smith complains has been upheld by Smith v. Commonwealth, 219 Va. 455, 480, 248 S.E.2d 135, 150 (Va. 1978). Furthermore, in considering a similar instruction under the same Virginia statute, this court recently ruled that the instruction was not constitutionally defective. Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984). In the instant case, the language focussed on as allegedly erroneous is: "if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment."[8] Briley v. Bass concluded that inclusion in the jury charge of "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life imprisonment" left the instruction free of constitutional error.

The messages conveyed to the juries in the two cases are not substantially different in meaning. The refutation of the appellant's contention in Briley v. Bass dictates the same result here. The use in the instant case of "may" instead of "shall" does not overcome the consideration that reading the

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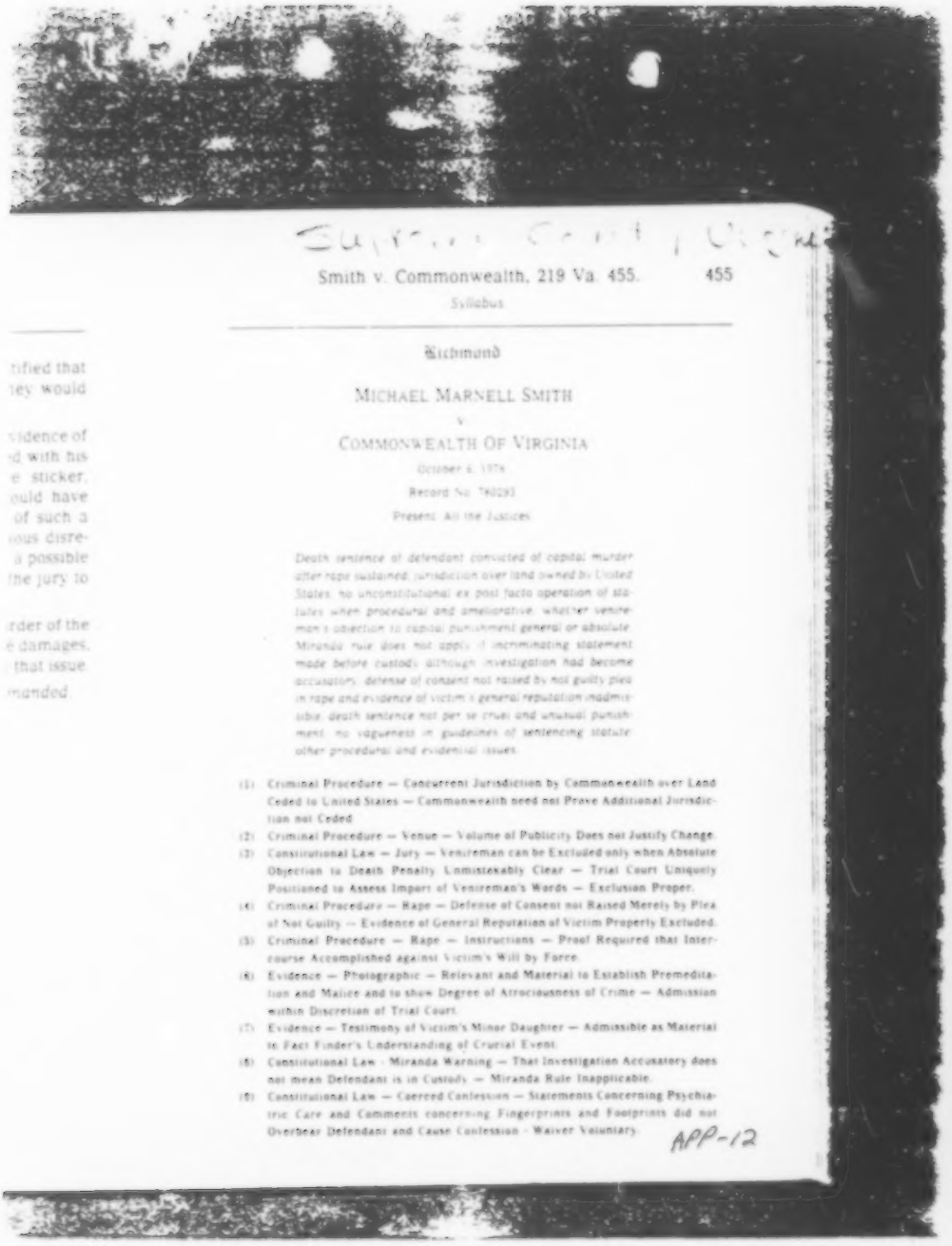
8 A related instruction read: "that when determining the punishment to be imposed . . . you shall consider . . . any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following . . . ."

instructions as a whole makes it altogether apparent that a finding that other mitigating circumstances did not justify a sentence of death necessitated rejection of the death penalty. Just as consideration of all the circumstances in Briley v. Bass converted "shall" to "may" in the statement "you shall fix the punishment of the defendant at death," so here "may" should be read as "shall."

Accordingly, we conclude that the action of the district court in dismissing the petition for a writ of habeas corpus should be, and it hereby is, affirmed.

Since execution is fixed for May 15, 1985, we grant a stay for a period of twenty-one (21) days from the filing of this opinion to permit the petitioner to apply to the Supreme Court or a Justice thereof for a further stay.

AFFIRMED.



Supreme Court of Virginia

Syllabus

Richmond

MICHAEL MARNELL SMITH

v.

COMMONWEALTH OF VIRGINIA

October 6, 1978

Record No. 780293

Present: All the Justices

Death sentence of defendant convicted of capital murder after rape sustained; jurisdiction over land owned by United States; no unconstitutional ex post facto operation of statutes when procedural and ameliorative; whether veniremen's objection to capital punishment general or absolute; Miranda rule does not apply if incriminating statement made before custody although investigation had become accusatory; defense of consent not raised by not guilty plea in rape and evidence of victim's general reputation inadmissible; death sentence not per se cruel and unusual punishment; no vagueness in guidelines of sentencing statute; other procedural and evidential issues.

(1) Criminal Procedure — Concurrent Jurisdiction by Commonwealth over Land Ceded to United States — Commonwealth need not Prove Additional Jurisdiction not Ceded.

(2) Criminal Procedure — Venue — Volume of Publicity Does not Justify Change.

(3) Constitutional Law — Jury — Venireman can be Excluded only when Absolute Objection to Death Penalty Unmistakably Clear — Trial Court Uniquely Positioned to Assess Import of Venireman's Words — Exclusion Proper.

(4) Criminal Procedure — Rape — Defense of Consent not Raised Merely by Plea of Not Guilty — Evidence of General Reputation of Victim Properly Excluded.

(5) Criminal Procedure — Rape — Instructions — Proof Required that Intercourse Accomplished against Victim's Will by Force.

(6) Evidence — Photographic — Relevant and Material to Establish Premeditation and Malice and to show Degree of Atrociousness of Crime — Admission within Discretion of Trial Court.

(7) Evidence — Testimony of Victim's Minor Daughter — Admissible as Material to Fact Finder's Understanding of Crucial Event.

(8) Constitutional Law - Miranda Warning — That Investigation Accusatory does not mean Defendant is in Custody — Miranda Rule Inapplicable.

(9) Constitutional Law — Coerced Confession — Statements Concerning Psychiatric Care and Comments concerning Fingerprints and Footprints did not Overbear Defendant and Cause Confession - Waiver Voluntary.

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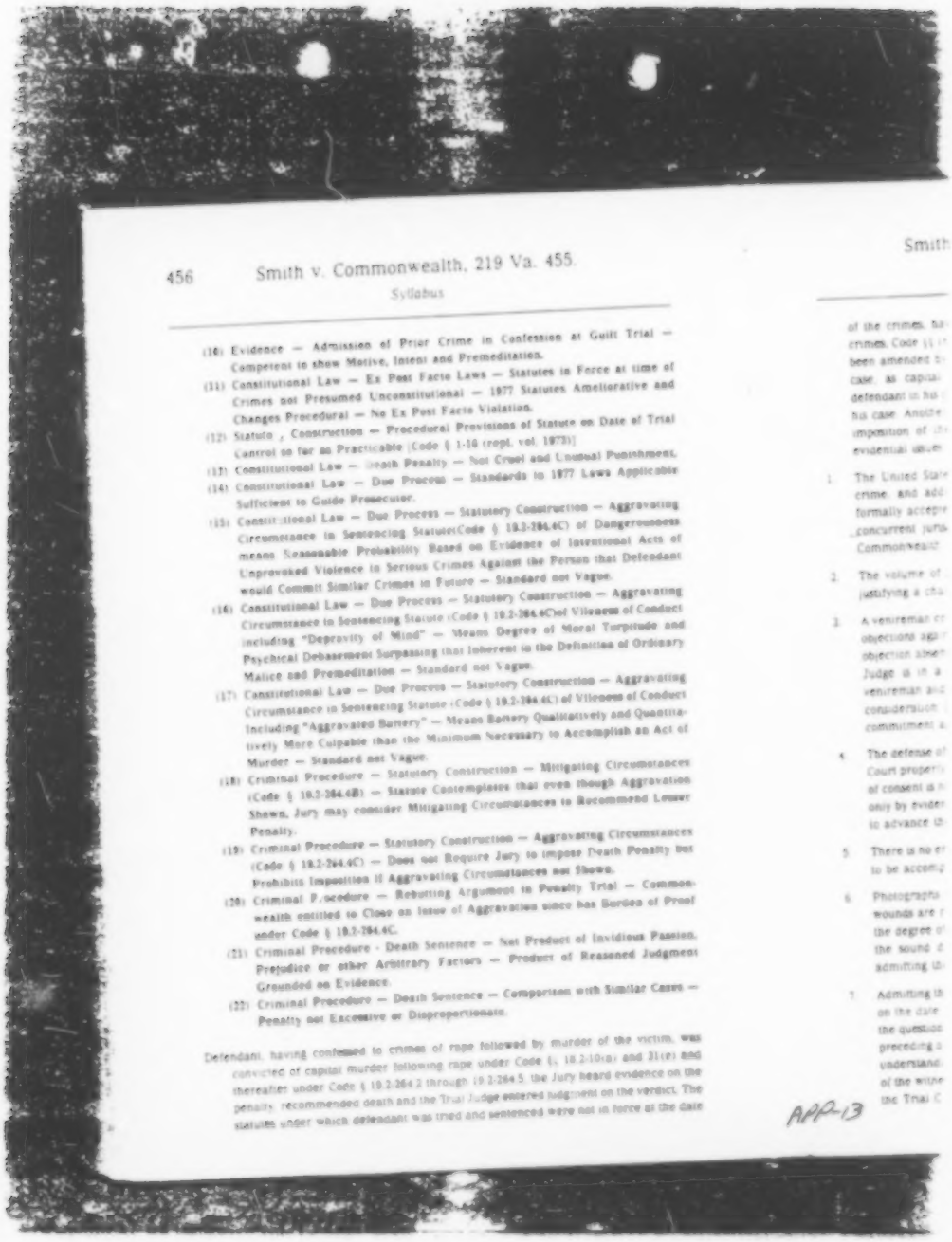

Syllabus

(10) Evidence — Admission of Prior Crime in Confession at Guilt Trial — Competent to show Motive, Intent and Premeditation.

(11) Constitutional Law — Ex Post Facto Laws — Statutes in Force at time of Crimes not Presumed Unconstitutional — 1977 Statutes Ameliorative and Changes Procedural — No Ex Post Facto Violation.

(12) Statute , Construction — Procedural Provisions of Statute on Date of Trial Control so far as Practicable (Code § 1-16 (repl. vol. 1973))

(13) Constitutional Law — Death Penalty — Not Cruel and Unusual Punishment.

(14) Constitutional Law — Due Process — Standards in 1977 Laws Applicable Sufficient to Guide Prosecutor.

(15) Constitutional Law — Due Process — Statutory Construction — Aggravating Circumstance in Sentencing Statute(Code § 19.2-264.4C) of Dangerousness means Reasonable Probability Based on Evidence of Intentional Acts of Unprovoked Violence in Serious Crimes Against the Person that Defendant would Commit Similar Crimes in Future — Standard not Vague.

(16) Constitutional Law — Due Process — Statutory Construction — Aggravating Circumstance in Sentencing Statute (Code § 19.2-264.4C)of Vileness of Conduct including "Depravity of Mind" — Means Degree of Moral Turpitude and Psychical Debasement Surpassing that Inherent in the Definition of Ordinary Malice and Premeditation — Standard not Vague.

(17) Constitutional Law — Due Process — Statutory Construction — Aggravating Circumstance in Sentencing Statute (Code § 19.2-264.4C) of Vileness of Conduct Including "Aggravated Battery" — Means Battery Qualitatively and Quantitatively More Culpable than the Minimum Necessary to Accomplish an Act of Murder — Standard not Vague.

(18) Criminal Procedure — Statutory Construction — Mitigating Circumstances (Code § 19.2-264.4B) — Statute Contemplates that even though Aggravation Shown, Jury may consider Mitigating Circumstances to Recommend Lesser Penalty.

(19) Criminal Procedure — Statutory Construction — Aggravating Circumstances (Code § 19.2-264.4C) — Does not Require Jury to impose Death Penalty but Prohibits Imposition if Aggravating Circumstances not Shown.

(20) Criminal Procedure — Rebutting Argument in Penalty Trial — Commonwealth entitled to Close on Issue of Aggravation since has Burden of Proof under Code § 19.2-264.4C.

(21) Criminal Procedure - Death Sentence — Not Product of Invidious Passion, Prejudice or other Arbitrary Factors — Product of Reasoned Judgment Grounded on Evidence.

(22) Criminal Procedure — Death Sentence — Comparison with Similar Cases — Penalty not Excessive or Disproportionate.

Defendant, having confessed to crimes of rape followed by murder of the victim, was convicted of capital murder following rape under Code §§ 18.2-10(a) and 31(e) and thereafter under Code § 19.2-264.2 through 19.2-264.5, the Jury heard evidence on the penalty, recommended death and the Trial Judge entered judgment on the verdict. The statutes under which defendant was tried and sentenced were not in force at the date

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of the crimes, having come into force on 1 July 1977. However, at the time of the crimes, Code §§ 18.2-10; 18.1-31 and 18.2-32 were in force, the latter two sections having been amended by Acts 1976, c.503 to classify murder subsequent to rape, as in this case, as capital murder with the sentence mandatory. One question raised by defendant in his appeal concerns the constitutionality of application of the 1977 laws to his case. Another concerns alleged vagueness of standards in Code § 19.2-264.4C for imposition of the death sentence. Numerous other constitutional, procedural and evidential issues are presented.

1. The United States, having been ceded concurrent jurisdiction over the situs of the crime, and additional jurisdiction being relinquished only by a deed of cession, formally accepted by the United States, it is presumed that the Commonwealth has concurrent jurisdiction over the situs since to hold otherwise would require the Commonwealth to prove a negative.

2. The volume of publicity concerning a crime does not impel a finding of unfairness justifying a change of venue.

3. A venireman constitutionally may not be excluded from service on the jury for general objections against the death penalty and the Trial Judge should not assume absolute objection absent an unambiguous statement by the venireman. Nevertheless the Trial Judge is in a unique position to assess the meaning of words employed by the venireman and his finding on the issue of objection will not be disturbed unless upon consideration of the voir dire as a whole the Court can say that the venireman's commitment against the death penalty was "not unmistakenably clear".

4. The defense of consent not having been advanced to the indictment for rape, the Trial Court properly excluded evidence of the general reputation of the victim. The defense of consent is not advanced solely by a plea of not guilty. The defense can be advanced only by evidence adduced by one of the parties and the evidence here was insufficient to advance the defense of consent.

5. There is no error in an instruction requiring proof that intercourse with the victim had to be accomplished against her will by force.

6. Photographs depicting contusions about the victim's neck, abrasions and multiple stab wounds are relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime. Admitting photographs in evidence is within the sound discretion of the Trial Court and there was no abuse of discretion in admitting the photographs here.

7. Admitting the testimony of victim's minor daughter as to when she last saw her mother on the date of the crime is not reversible error. The testimony, while not relevant to the question of guilt, supplemented the testimonial narrative of the sequence of events preceding and following commission of the crime and was material to the fact finder's understanding of the events. With deference to the Trial Court's superior perspective of the witness and the impact of her testimony upon the jury the Court cannot say that the Trial Court committed reversible error in allowing the testimony.

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Syllabus

8. The Miranda Rule applies only when there is a custodial investigation. The fact that the investigation had focused upon the suspect and had become accusatory is not determinative of the question of custody. While the Trial Court was not bound to believe defendant's testimony that he said "I'm the one" before the Miranda warning was given, the statement, in any event, was not the product of a custodial investigation.

9. Neither the officers' statements about defendant's need for psychiatric help nor their comments about fingerprints and footprints overbore defendant's will and caused him to execute a waiver and make a confession which otherwise he would have withheld.

10. Defendant having confessed that his reason for killing his victim he raped was to silence his accuser and, having referred in his confession to his return to the penitentiary, this admission, while referring to his prior criminal record, is admissible in his guilt trial to show motive, intent and premeditation.

11. While the crimes were committed on 23 May 1977 and the statutes under which defendant was convicted went into force on 1 July 1977, the statutes in force at the time of the crimes establishing a mandatory death penalty were not presumptively unconstitutional under *Roberts v. Louisiana*, 428 U.S. 280 (1976) and *Woodson v. North Carolina*, 428 U.S. 242 (1976). The 1977 laws were ameliorative and procedural and there is no ex post facto violation. *Dobbert v. Florida*, 432 U.S. 282 (1977) followed.

12. Code § 1-16 (repl. vol. 1973) requiring that proceedings under a new statute "shall conform, so far as practicable, to the laws in force at the time of such proceedings" means that the procedural provisions of the statute in effect at the date of trial control so far as practicable. This was done in defendant's case.

13. The death penalty does not constitute per se cruel and unusual punishment.

14. The standards contained in Code § 19.2-264.4 for imposing the death penalty due to aggravating circumstances are not so vague that adequate standards are not supplied to guide the prosecutor in selecting which defendants will be prosecuted for capital offenses.

15. To establish dangerousness as an aggravating circumstance, the Commonwealth must prove beyond a reasonable doubt that there is a probability that defendant would commit criminal acts of violence such as would prove a continuing severe threat to society. This focuses the fact finder's attention on prior criminal conduct as the principal predicate for a prediction of future dangerousness. If defendant has been convicted previously of serious crimes against the person, these being committed by intentional acts of uncontrolled violence, there is a reasonable probability that he would commit similar crimes in the future. This probability fairly supports the conclusion that society would be faced with a continuing serious threat.

16. "Depravity of mind", as this relates to "vileness" described as an aggravating factor in Code § 19.2-264.4C, means a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.

17. "Aggravated battery", as d
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Appeal from a juc
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Amicus Curiae: I
Virginia School of
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APP-15

Syllabus

17. "Aggravated battery", as this relates to "vileness" described as an aggravating factor in Code § 19.2-264.4C, means a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder.

18. The Virginia statute, Code § 19.2-264.4B, provides a list of mitigating circumstances which the fact finder is required to consider in pari materia with aggravating circumstances but the list is illustrative and not exclusive.

19. While Commonwealth's instruction I is not artfully drawn, when read as a whole it fairly expounds the thrust of Code § 19.2-264.4C that the death penalty will not be imposed unless the Commonwealth proves one of two aggravating circumstances beyond a reasonable doubt. The statute does not require that upon such proof the jury must impose the extreme penalty but only that absent such proof it shall not do so. Such discretion in the sentencing authority is not constitutionally infirm.

20. Code § 19.2-264.4C, placing upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt, the Virginia rule is that the party having the affirmative of the issue has the right to open and conclude the argument before the jury. Dean v. Commonwealth, 42 Va (1 Gratt.) 557 (1844) followed.

21. The sentence imposed was not the product of invidious passion, prejudice or other arbitrary factor but was the product of a reasoned judgment grounded on the evidence and in accordance with law and the Court should not commute the death sentence to life imprisonment.

22. This being the first case reviewed under the 1977 law, no records of cases involving the particular crime charged being available for comparison, in consideration of the record as a whole and to the extent the Court can make a meaningful comparison with other capital cases, the penalty imposed was not excessive or disproportionate.

Appeal from a judgment of the Circuit Court of the City of Williamsburg and County of James City. Hon. Russell M. Carneal, judge presiding.

Affirmed.

David F. Pugh (*James Updike; Stone, Bland & Wood*, on brief) for appellant.

James E. Kulp, Assistant Attorney General (*Marshall Coleman*, Attorney General, on brief) for appellee.

Amicus Curiae: Post-Conviction Assistance Project of the University of Virginia School of Law (*Richard J. Bonnie; John Petrila*, on brief) for appellant.

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POFF, J., delivered the opinion of the Court.

On November 2, 1977, Michael Marnell Smith was convicted by a jury of capital murder following rape. Code § § 18.2-10(a) and 31(e) (Cum. Supp. 1977). The next day, pursuant to the bifurcated trial proceedings prescribed by Code § § 19.2-264.2, -264.3, -264.4, -264.5 (Cum. Supp. 1977), the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's recommendation and entered final judgment November 30, 1977. Defendant's appeal and automatic review of sentence were consolidated and accorded priority on the docket. Code § § 17-110.1, -110.2 (Cum. Supp. 1977). By leave of court, the Post-Conviction Assistance Project of the University of Virginia filed a brief *amicus curiae* in support of defendant's position.[1] This is the first capital case appealed under the current statutes.

The medical evidence showed that Mrs. Audrey Jean Weiler, whose body was found floating in the James River at a point near the Colonial Parkway within James City County, died on May 23, 1977 as the result of asphyxia, drowning, and multiple stab wounds.

Defendant signed a written statement admitting that he encountered decedent walking alone on the beach, displayed a knife, ordered her to disrobe, and engaged in sexual intercourse with her; that, fearing she "could send [him] back [to the penitentiary]", he "started choking her with both hands . . . until she went limp"; and that he then "dragged her out into the water a couple of feet", "held her head under the water . . . [until] she stopped moving", and "stabbed her in the back several times."

On brief, defendant poses multiple questions which we will address in five categories. The first category relates to pre-trial proceedings; the second to the guilt trial; the third to constitutional challenges to the statutory complex under which defendant was convicted and sentenced; the fourth to the penalty trial; and the fifth to the propriety of the penalty imposed.

[1] We will consider the arguments advanced by *amicus* in support of the errors assigned by defendant. Some of the issues raised by those arguments, however, were never raised in the court below, are not comprehended by the assignments of error, and are not addressed by defendant on appeal. Such issues will not be noticed by this Court. Rule 5:21.

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I. PRE-TRIAL PROCEEDINGS

A. Jurisdiction

[1] Defendant assigns error to the trial court's denial of his pre-trial motion to dismiss for lack of jurisdiction. Tacitly acknowledging that the crime was committed within the geographical boundaries of James City County, defendant argues that, since the land in question is owned by the United States, it was incumbent upon the Commonwealth to show that the United States did not have exclusive jurisdiction over crimes committed thereon. It is well settled, however, that the mere ownership of land by the United States does not divest a state of its jurisdiction over that land, and that the nature and extent of the federal jurisdiction is dependent upon the consent of the state. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *accord*, *Waltrip* v. *Commonwealth*, 189 Va. 365, 53 S.E.2d 14 (1949). The United States was ceded *concurrent* jurisdiction by statute over crimes committed on land to which it holds title within the Commonwealth. Code § 7.1-21(1) (Repl. Vol. 1973).[1] Any additional jurisdiction over this land can be relinquished only if the Commonwealth executes a deed of cession, and the deed must be formally accepted by the United States. Code § 7.1-21 (Cum. Supp. 1978); 40 U.S.C.A. § 255 (1970). In light of the cession by statute, it is presumed that the Commonwealth retains concurrent jurisdiction over the area embracing the locus of the crime. To hold otherwise, would be to require the Commonwealth to prove the negative, *i.e.*, that the United States was not deeded and did not accept exclusive jurisdiction. Since defendant adduced no evidence to show the affirmative, the presumption prevails and the trial court's ruling on the motion to dismiss was proper.

B. Change of Venue

[2] In support of his motion for a change of venue, defendant introduced numerous newspaper clippings, transcripts of radio broadcasts, and affidavits to show that the news media had given extensive publicity to the details of the crime with which he was charged, to his earlier conviction of rape, and to the "outbreak of

[1] This paragraph of the statute was repealed by Acts 1976, c. 211, but, by the same enactment, a similar provision was incorporated in Code § 7.1-18.1 (Cum. Supp. 1978).

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rapes in the Williamsburg-college community." Conceding that a change of venue is within the sound discretion of the trial court, *Lewis v. Commonwealth*, 218 Va. 31, 34, 235 S.E.2d 320, 322 (1977), defendant contends that the publicity prejudiced his right to a fair trial and that the trial court abused its discretion.

Defendant does not dispute the factual accuracy of the publicity. Nor does he point to anything of record to indicate that a single juror seated at trial was unable to disregard the publicity and accord him a fair trial. The burden of defendant's complaint is that the sheer volume of publicity concerning so heinous a crime, committed by a prior offender against a member of a family prominent in the community, compels a finding of unfairness. We disagree.

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But . . . extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do . . . .

Dobbert v. Florida, 432 U.S. 282, 303 (1977); *see also Greenfield v. Commonwealth*, 214 Va. 710, 716-17, 204 S.E.2d 414, 419-20 (1974).

We hold that defendant has failed to show that he could not or did not receive a fair trial in the jurisdiction in which he was convicted, and we find no abuse of judicial discretion in the trial court's ruling.

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391 U.S. at 522, n.

APP-19

C. Exclusion of Juror

[3] The trial court excluded Mrs. Piggott as a juror for cause related to her predisposition against capital punishment. Relevant portions of the *voir dire* are assembled at the foot of this opinion as Appendix B.

Veniremen may not constitutionally be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", *Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968), and exclusion of a single veniremen for such cause renders the death penalty constitutionally infirm. *Davis* v. *Georgia*, 429 U.S. 122, 123 (1976).

In support of his assignment of error to the trial court's ruling, defendant relies principally upon portions of two footnotes in *Witherspoon*:

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

391 U.S. at 516, n.9.

> The most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.
>
> . . . .
>
> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . .

391 U.S. at 522, n.21.

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The courts which have addressed the question do not agree what effect these two footnotes have upon the textual holding that "general objections" to capital punishment are not sufficient grounds to exclude a venireman for cause. *See* 39 ALR 3d 550 (1971). In our view, footnote 9 means that, absent an unambiguous statement of *absolute* objection, the trial judge cannot *assume* absolute objection. It does not mean that, simply because there may be some confusion and inconsistency in the statements that were made, the trial judge is foreclosed from determining from the *voir dire* at large whether a juror would "*automatically* vote against the imposition of capital punishment"

> [E]ven though a prospective juror's *voir dire* answers to questions concerning his beliefs as to capital punishment may be equivocal and not models of clarity, it is proper for the trial judge to excuse the juror for cause when a contextual consideration of the entire *voir dire* examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty.

State v. Simmons, 286 N.C. 681, 688-89, 213 S.E.2d 280, 286 (1975), *vacated on other grounds*, 428 U.S. 903 (1976).

While footnote 9 is merely a comment parenthetical to the *Witherspoon* Court's recitation of the proceedings in the trial court, footnote 21 is keyed to and is a corollary of the textual holding. Under the holding and corollary read together, "general objections" to capital punishment are not constitutionally sufficient to justify the exclusion of a juror for cause; nothing less than an absolute objecton, *i.e.*, an irrevocable commitment to vote against the death penalty, will suffice.

Whether an exclusion is justified under the *Witherspoon* test is a mixed question of law and fact. Stated differently, the question whether the veniremen should be excluded turns upon the question whether, in fact, he is "irrevocably committed". In order to apply the rule of law, the trial court must first decide the factual question. As fact-finder, the trial court must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone, and tenor of the dialogue, and the general

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demeanor of the prospective juror. We are aware that, while the words employed may, when transcribed and read in retrospect, appear ambivalent, the judge who heard them uttered was uniquely positioned to assess their ultimate import. Accordingly, his finding on this question of fact will not be disturbed on appeal unless, upon consideration of the *voir dire* as a whole, we can say that the venireman's commitment against the death penalty was not "unmistakably clear".

The record of the *voir dire* shows that, in response to several questions patently phrased to elicit such a response, Mrs. Piggott agreed that capital punishment might "possibly" be appropriate in some cases. At least six times, however, she stated positively, and with no ambiguity, equivocation, or reservation whatsoever, that she could never, under any circumstances, vote to impose the death penalty. In reply to the last two questions put to her, she acknowledged that, if defendant should be convicted, she would vote for a "lifetime" penalty and that she was "absolutely against the death penalty".

In argument following the *voir dire*, counsel agreed that the test for exclusion was not whether Mrs. Piggott was "against the death penalty", but rather whether she was "absolutely against the death penalty". Noting the inconsistency in some of the responses to questions phrased by respective counsel, the trial court concluded that "life is all she'd ever give" and discharged her from the jury panel. We cannot say that this finding of fact was not "unmistakably clear", and we hold that the ruling grounded upon that finding did not contravene the principles announced in *Witherspoon* and its progeny.

II. THE GUILT TRIAL

A. Reputation Evidence

[4] Rape was an essential element of the crime of capital murder charged in the indictment. Code § 18.2-31(e). "[W]here consent is advanced as a defense to a charge of rape, the previous unchaste character of the prosecutrix may be shown by proof of general reputation." *Wynne v. Commonwealth*, 216 Va. 355, 356, 218 S.E.2d 445, 446 (1975). The trial court refused to permit such evidence on the ground that the defense of consent had not been advanced.

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As defendant says, once the defense is advanced, the issue of consent vel non becomes a jury question. But whether evidence relevant thereto is admissible is an evidentiary question. That issue depends upon whether the defense of consent has been advanced.

We do not agree that the defense is advanced solely by a plea of not guilty. That plea could be grounded upon defendant's belief that the Commonwealth is unable to prove identification, opportunity, or the physical elements of carnal knowledge. The defense of consent can be "advanced" within the meaning of the rule in *Wynn* only by evidence adduced by one of the parties. Whether the evidence is sufficient for that purpose necessarily is a question of law.

Here, the only evidence relevant to that question was defendant's own account of how the crime was committed. On appeal, defendant emphasizes certain circumstances as described in his confession: he met the decedent on a deserted beach; she joined him in friendly conversation; she permitted him to remove briars from her bare feet; she walked with him to a wooded area; she removed her own clothes and a tampon; and she made no attempt to escape while he affixed a contraceptive device. In light of the absence of evidence of a struggle or "defensive wounds", defendant says, this evidence was sufficient to advance the defense of consent.

In making its determination on this question, the trial court was not confined to isolated excerpts of the confession. According to other portions of the confession, when the decedent "started to walk toward her car and said 'I'm going' ", defendant put his "right arm around her waist" and told her, "come on, go with me"; she "was not too willing at first, so [he] pulled on her" and, when she asked him several times, "where are we going", he told her to "just keep on walking"; when they reached the wooded area, he "pulled a knife" and "told her to take her clothes off"; she then said, "please don't do this, I've got two kids at home, you don't need me", and telling her, "I've got to have you", defendant "got on top of her and had sexual relations with her".

The absence of evidence of a struggle or defensive wounds was largely irrelevant to the question before the trial court, for a

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"woman is not required to resist to the utmost of her physical strength if she reasonably believes that resistance would be useless and result in serious bodily injury to her." *Barnett* v. *Commonwealth*, 216 Va. 200, 202, 217 S.E.2d 828, 830 (1975). Nowhere in his confession did defendant claim that the act of intercourse was consensual. Rather, he acknowledged that he applied force in taking her to the wooded area, that he threatened her with a knife, and that she protested his advances. We believe the only reasonable conclusion the evidence supports is that she submitted, not out of volition, but out of a state of fear, one which, given the brutal consequences which followed, was fully justified.

We hold, therefore, that the trial court correctly ruled as a matter of law that the defense of consent had not been advanced and that the evidence defendant proffered was inadmissible.

B. Instruction on Rape

[5] As tendered, defendant's Instruction "H" defining forcible rape required the Commonwealth to prove that the act of intercourse was accomplished "by force and violence". Code § 18.2-61 does not require the Commonwealth to prove violence. Before granting the instruction, the trial court amended the language to require proof that intercourse with the decedent was accomplished "against her will, by force". The amendment accords precisely with the statutory definition, and we find no error in the trial court's action.

C. Photographs

[6] Defendant charges that, since photographs of the victim's body "were not necessary to identify the victim", they were merely inflammatory and, hence, inadmissible.

The admissibility of photographs is a matter within the sound discretion of the trial court. *Inge* v. *Commonwealth*, 217 Va. 360, 364, 228 S.E.2d 563, 566 (1976). There is no abuse of discretion in admitting photographs which are "relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime." *Brown* v. *Commonwealth*, 212 Va. 515, 519, 184 S.E.2d 786, 789 (1971).

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We are of the opinion that the photographs depicting contusions about the victim's neck, abrasions on her back, and multiple stab wounds in her body were relevant and material for the purposes approved in Brown and that they were no more inflammatory than the medical testimony detailing the results of the autopsy.

D. Testimony of Victim's Daughter

[7] The crime occurred at "approximately 1:45 or 2:00 p.m." on May 23, 1977. Heather Weiler, the victim's young daughter, testified that she last saw her mother at 8:00 a.m. that morning. One witness saw Mrs. Weiler alive at 10:30 a.m. and another at noon. Other witnesses described events late that afternoon leading to the discovery of the victim's body and other physical evidence.

Conceding that "the admissibility of evidence is within the sound discretion of the trial court", defendant contends that, since Heather "had no personal knowledge of the offense", her testimony "served only to inflame the jury" and its admission constituted an abuse of discretion.

As we read Heather's testimony, it did nothing more than supplement the testimonial narrative of the sequence of events preceding and following the commission of the crime. Such background events, though not directly relevant to the question of guilt, are material to the fact-finder's understanding of the crucial event, and for that purpose courts allow considerable leeway in the testimonial narrative. *See* McCormick, *Evidence*, (2d ed. 1972) § 185, p. 434.

We are of opinion that Heather's testimony was not, in the due process connotation of the word, inflammatory. None of her language was inflammatory *per se*. Given the fact the jury was already aware that the decedent was the mother of two young children, it is unlikely that Heather's appearance in the courtroom was inflammatory. The record does not disclose, and defendant does not argue, that Heather's conduct or demeanor during her brief testimony was maudlin, vengeful, or otherwise emotional. Hence, giving due deference to the trial court's superior perspective of the witness and the impact of her testimony on the jury, we cannot say that the trial court committed reversible error in allowing her testimony.

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E. Competency of Confession

(1) *Miranda*

[8] Defendant and his brother Howard lived on a farm near the scene of the crime. Officer Dunford, who was aware of defendant's prior conviction of rape, and Officers Gunson and Cumbee went to the farm and asked Howard if they could talk with defendant. Defendant was not there but, in response to Howard's telephone call, arrived a short time later. Standing in a hallway just inside the front door of the Smith home, the officers questioned defendant as he sat on the short staircase leading to the kitchen. They told him they were investigating the Weiler murder and asked him if he "had done this thing". Without any foundation in fact, Dunford suggested that defendant's fingerprints and footprints had been found at the scene of the crime. Later, while Dunford was in the kitchen talking with Howard, Gunson told defendant he believed he was guilty and urged him to confess and ease his conscience. The officers testified that, during the course of the interrogation, which lasted for possibly 15 minutes, defendant made no inculpatory statements. "He sat on the step with his head bowed, looking at the floor and twirling the front of his hair with his forefingers", and, according to the officers, his only responses were, "I know you would have come to see me" and, "Do you think a lawyer could help me?" At that point, Gunson held up his hand and told defendant not to say anything more. Cumbee read the *Miranda* warnings twice, asked whether defendant understood them, and defendant acknowledged that he did. Defendant then made an oral confession, showed the officers the scene of the crime, and pointed out the place he had discarded the murder knife. Later at the jail, defendant signed the written confession introduced in evidence.

Testifying solely in support of his motion to suppress, defendant said that, during the course of the initial interrogation, he had told the police, "I'm the one." This statement, he insisted, was made only after the investigation had "focused" upon him and had become "accusatory" and before the *Miranda* warnings were given. Therefore, he contends, he was under "custodial interrogation", his inculpatory statement was inadmissible under *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), and his subsequent confession and all of the evidence

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derived therefrom was "tainted" under the rule in *Wong Sun v. United States*, 371 U.S. 471 (1963).

Miranda applies only where there is "custodial interrogation", *i.e.*, "questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. The fact that the investigation had focused upon the suspect and had become accusatory is not determinative of the question of custody. *Jordan v. Commonwealth*, 216 Va. 768, 772, 222 S.E.2d 573, 577, at n.1 (1976); cf. *Beckwith v. United States*, 425 U.S. 341, 344-48 (1976). At the time defendant says he made the first incriminating statement, he had not been "deprived of his freedom in any significant way". He was not under arrest; no physical restraint of any kind had been imposed; and he was situated in a familiar, non-coercive environment which he had entered of his own accord. The trial court was not bound to believe defendant's testimony, but even if the inculpatory statement he said he made was made at the time he said, it was not the product of custodial interrogation, and we find no error in the trial court's ruling to that effect.

[9] We see no merit in defendant's further argument that "his waiver was not voluntary because . . . statements made by the three police officers could reasonably have been interpreted as offers of psychiatric treatment." It is true that the police had discussed defendant's need for psychiatric help, but they testified unanimously and positively that no offers or promises were made, and nothing defendant said in the suppression hearing contradicted that testimony. Nor do we believe that the officers' comments about the fingerprints and footprints overbore defendant's will and caused him to execute a waiver and make a confession he otherwise would have withheld. We conclude that defendant's waiver was voluntary and that the trial court did not err in admitting his confession.

(2) *Admission of Prior Crime*

[10] Defendant's confession included the following exchange:

Q. Why did you kill her?

A. All I could think about was going back to the penitentiary. I was afraid she could send me back.

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Evidence of defendant's prior criminal record adduced at the penalty trial was fully admissible. Code § 19.2-264.4B, C (Cum. Supp. 1977). Defendant contends, however, that the trial court should have excluded this portion of his confession at the guilt trial.

Generally, evidence of prior crimes is incompetent because it "confuses the issue before the jury, unfairly surprises the accused with a charge he is not prepared to meet, and tends to prejudice him in the minds of the jury". *Fleenor v. Commonwealth*, 200 Va. 270, 275, 105 S.E.2d 160, 163 (1958).

> There are exceptions, however, to this rule, as well established as the rule itself, and such evidence may be admitted to show motive, intent or guilty knowledge, or when it is connected with or leads up to the offense for which the accused is on trial.

Roy v. Commonwealth, 191 Va. 722, 726, 62 S.E.2d 902, 903 (1951).

Defendant freely admitted that his reason for killing the woman he had raped was to silence his accuser in order to avoid the consequences of his crime. We hold that his admission was fully competent to show motive, intent, and premeditaton.

III. CONSTITUTIONAL CHALLENGES TO THE STATUTORY COMPLEX

A. Preface

The pertinent portions of the statutory complex under which defendant was convicted and this review was docketed appear at the foot of this opinion as Appendix A. A premeditated killing following rape is one of the crimes denominated "capital murder", a class 1 felony punishable by death or imprisonment for life. When an indictment for a class 1 felony is tried by a jury, four separate proceedings must be conducted before a sentence of death can be executed. Three evidentiary hearings must be conducted. In the first, the jury must determine the issue of guilt or innocence and may convict the defendant of the crime charged or a lesser-included offense. If the defendant is convicted of a class 1 felony, there must be a second trial by the same jury to determine the issue whether the penalty should be death or imprisonment for

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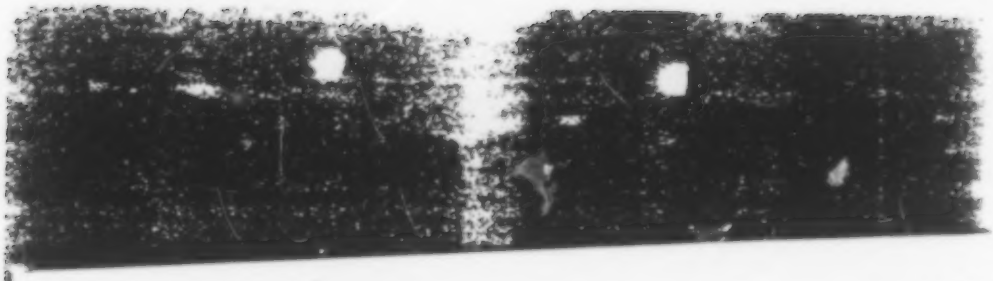

life. Bearing upon that determination, the jury may hear evidence concerning circumstances surrounding the offense, the history and background of the accused, and facts in mitigation of the offense. For illustrative purposes and not by way of limitation, five mitigating circumstances are expressly listed.

The jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense. The Commonwealth must prove beyond a reasonable doubt either that there is a "probability" that the defendant would "commit criminal acts of violence that would constitute a continuing serious threat to society", or that his conduct in committing the crime was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim." Code § 19.2-264.2. It is clear from the statutory context that, even when the Commonwealth establishes either or both aggravating circumstances, the jury is at liberty, in consideration of circumstances in mitigation, to recommend a sentence of imprisonment for life.

The penalty verdict must be in writing in one of two prescribed forms - one for a life sentence and the other for a death sentence. The latter contains a recitation of a finding of either "dangerousness" or "vileness" and a statement that the jury has considered evidence in mitigation of the offense. If the jury is unable to agree upon the penalty, the trial court is required to impose a sentence of imprisonment for life.

When the jury recommends the death penalty, the trial court must direct a probation officer to investigate the history of the defendant and other relevant facts and make a report to the trial court in accordance with the provisions of Code § 19.2-299. Under that statute, a copy of the report must be made available to the defendant at least five days before it is presented in open court and the defendant is guaranteed the right to cross-examine the investigating officer and the right "to present any additional facts bearing upon the matter which he may desire to present."

At the conclusion of this third hearing, if the trial court determines that the death penalty is not "appropriate and just", it may set aside the sentence of death and impose a life sentence.

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If the trial court affirms the death sentence, the defendant is entitled to an appellate review of the sentence as a matter of right, and the review is accorded priority on our docket. In the course of this fourth proceeding, this Court is directed to make two determinations, viz., whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, and whether, considering similar cases, the penalty is excessive or disproportionate. Having made these determinations, this Court may affirm the death penalty or commute it to life imprisonment.

To this statutory complex, defendant poses a two-fold challenge. First, he maintains that, as applied to his case, it offends the *ex post facto* clauses of the federal and state constitutions, U.S. Const. art. 1, § 10, and Va. Const. art. 1, § 9. Second, he contends that the statutory scheme is facially unconstitutional under the Eighth and Fourteenth Amendments.

Initially, we will summarize relevant developments in statutory and case law following the watershed decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). *Furman* held that a statutory system which permits unbridled discretion in the process of imposing the death penalty violates the Eighth and Fourteenth Amendments. Responding to *Furman* in 1975, the General Assembly enacted new statutes eliminating sentencing discretion by making the death penalty mandatory upon conviction of selected offenses. Acts 1975, cc. 14, 15; Code § § 18.2-1, *et seq.* (Repl. Vol. 1975).

Thereafter, in 1976 the United States Supreme Court decided five cases attacking the constitutionality of death penalty statutes. In *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), and *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), mandatory death sentences were declared to be a constitutionally impermissible response to *Furman*. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court decided that *Furman* did not require that all sentencing discretion be eliminated if the statutory system provides adequate standards to guide the exercise of that discretion.

In 1977, following the pattern approved in *Jurek*, the General Assembly enacted the statutory complex *sub judice*.

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B. As Applied Constitutionality

The crime at bar was committed May 23, 1977. The statutes under which defendant was convicted did not take effect until July 1, 1977. Defendant argues that *Roberts* and *Woodson* rendered the mandatory death provisions of Title 18.2 as enacted in 1975 (hereinafter, the 1975 law) "presumptively unconstitutional" and that, on the date of the crime of which he was convicted, the death penalty could not be imposed in Virginia; that Title 18.2 as enacted in 1977 (hereinafter, the 1977 law) was not ameliorative because it increased the potential penalty; and that the application of the more onerous 1977 law to a crime committed before it became effective thus violated the *ex post facto* clauses.

Manifestly, the alternative penalty provisions of the 1977 law were less onerous than the mandatory penalty provision of the 1975 law, and we do not agree that the 1975 law was "presumptively unconstitutional" at the time this crime was committed. In *Lewis* v. *Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977), the defendant argued that *Roberts* and *Woodson* had invalidated the provisions of Code § 53-291 which prescribed a mandatory death penalty for the killing by an inmate of an employee of a prison. Noting that we had upheld the constitutionality of that statute in *Washington* v. *Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975), and *Jefferson* v. *Commonwealth*, 214 Va. 747, 204 S.E.2d 256 (1974), we held that, until we had formally adjudicated a constitutional challenge, the statute "stand[s], at least presumptively, valid and enforceable." *Lewis*, 218 Va. at 38, 235 S.E.2d at 324.

The United States Supreme Court reached a similar conclusion from a comparable predicate in *Dobbert* v. *Florida*, 432 U.S. 282 (1977). Dobbert's crimes antedated the June 22, 1972 decision in *Furman*. The month following that decision, the Florida Supreme Court held that *Furman* invalidated the State's death penalty statutes. *Donaldson* v. *Sack*, 265 So.2d 499 (Fla. 1972). Later that year, Florida enacted the new statutes under which Dobbert was convicted. Dobbert claimed that there was no "valid" death penalty "in effect" on the date of his crime and that the application of the new statutes to his case increased the penalty and violated the *ex post facto* clause. Rejecting that argument, the Court said:

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> Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Dobbert, 432 U.S. at 297.

There can be no doubt about Virginia's historical view of the gravity of premeditated murder; the death penalty has been on our statute books since 1796. Given this ancient prologue and in light of the statute on the books on the date of the crime at bar which, as we have said, was presumptively valid and enforceable, we believe defendant had "fair warning" of the consequences of murder.

We conclude, therefore, that since the 1975 law was presumptively valid, the 1977 law was ameliorative. When the changes the subsequent law makes in the prior law are ameliorative, there is no *ex post facto* violation; the same is true when the changes, though not ameliorative, are merely procedural. *Dobbert*, 432 U.S. at 292, n.6. Clearly, the changes incorporated in the 1977 law were both ameliorative and procedural. Prompted by the teachings of *Jurek*, *Proffitt*, *Gregg*, *Roberts*, and *Woodson*, the General Assembly changed the 1975 law and established new procedures to be employed in the sentencing process to insure that the death penalty would not be imposed in an arbitrary or capricious manner. We hold, therefore, that the trial court committed no constitutional error in applying the 1977 law to defendant's case.

[12] Aside from this constitutional challenge, defendant invokes the provisions of Code § 1-16 (Repl. Vol. 1973) which read in pertinent part:

> No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any . . . punishment incurred . . . or in any way whatever to affect any such offense or . . . punish-

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> ment so incurred . . . save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings . . . .

Citing *Ferguson* v. *Ferguson*, 169 Va. 77, 192 S.E. 774 (1937), defendant argues that, absent an expression of legislative intent to the contrary, all new statutes must be applied prospectively only. While it is true that the 1977 law is silent on the question, § 1-16 itself expressly provides that "proceedings" under a new statute "shall conform, so far as practicable, to the laws in force at the time of such proceedings." We construe this language to mean that procedural provisions of the statute in effect on the date of trial control the conduct of trial insofar as practicable. Defendant's trial was conducted in strict compliance with the new procedures in effect on the date of his trial, and we find no merit in his argument.[1]

C. Facial Constitutionality

[13-14] Defendant maintains that the 1977 law is facially unconstitutional under the Eighth and Fourteenth Amendments. He argues that the death penalty *per se* constitutes cruel and unusual punishment. Observing that *Furman*, *Roberts*, and *Woodson* interpreted the Eighth and Fourteenth Amendments to prohibit statutory schemes which vest "unbridled discretion" in the sentencing authority, he also argues that the Virginia statutes vest such discretion in the Commonwealth's Attorney; he reasons that, absent statutory standards to guide the prosecutor in selecting which defendants will be prosecuted for a capital offense and which for a non-capital offense, the 1977 law is facially arbitrary and capricious.

Both of these arguments were considered and rejected by the plurality of the United States Supreme Court in *Jurek*, *Proffitt*, and *Gregg* and by this Court in *Washington* v. *Commonwealth*, *supra*, and *Jefferson* v. *Commonwealth*, *supra*. For the reasons stated there, we decline defendant's invitation to disregard these precedents.

[1] On brief, defendant also argues that, as applied to a male, Code § 18.2-61 (Repl. Vol. 1975), which defines rape (one of the elements of the instant crime) as carnal knowledge of a female against her will and by force, constitutes a denial of equal protection of the laws. This question was not raised below, it was not the subject of an assignment of error, and it was not argued at bar. It will not, therefore, be noticed here. Rule 5:21.

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We are not persuaded by the contention that the statutory definitions of the two aggravating circumstances (see Appendix A) are so vague as to vest the sentencing authority with standardless sentencing power.

[15] The language defining the first aggravating circumstance, *i.e.*, the potential "dangerousness" of the defendant, is identical to that in the Texas statute upheld in *Jurek*. Rejecting a vagueness challenge to that language, the *Jurek* court said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. [footnotes omitted].

428 U.S. at 274-76.

To establish "dangerousness" the Commonwealth must prove beyond a reasonable doubt that there is a "probability" that the defendant would commit "criminal acts of violence" such as would pose a "continuing serious threat to society". We see no constitutional vagueness in that language.

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In our view, it is designed to focus the fact-finder's attention on prior criminal conduct as the principal predicate for a prediction of future "dangerousness".[4] If the defendant has been previously convicted of "criminal acts of violence", i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability", i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat".

[16-17] It also appears that the language defining the second aggravating circumstance, *i.e.*, the "vileness" of the defendant's conduct in committing the crime, is the same as that in the Georgia statute upheld in *Gregg*. Since any act of murder arguably involves a "depravity of mind" and an "aggravated battery to the victim", it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance. We regard such a construction as strained, unnatural, and manifestly contrary to legislative intent. The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class.

Hence, we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. *See Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933 (1977).[5] It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman".

[4] It should be noted that, while prior criminal conduct is the principal predicate, the statute provides a further predicate, viz., "the circumstances surrounding the commission of the offense of which [the defendant] is accused".

[5] *See also* Florida's construction of other language defining a similar aggravating circumstance in *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), cited with approval in *Proffitt*, 428 U.S. at 255.

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[18] We note in passing that the Virginia statute contains a constitutional safeguard not explicitly articulated in the Texas statute. The 1977 law provides a list of mitigating circumstances which the fact-finder is required to consider *in pari materia* with aggravating circumstances. The list is illustrative and not exclusive; the statute expressly provides that facts in mitigation "may include, but shall not be limited to" the items codified, and that evidence may be adduced to show "any other facts in mitigation of the offense."[4] Code § 19.2-264.4B. Although the Texas statute was silent in this respect, it was found to be constitutionally sufficient on the grounds that the Texas Court of Criminal Appeals had "indicated that it will interpret . . . [the statute] so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show". *Jurek*, 428 U.S. at 272.

IV. THE PENALTY TRIAL

A. Commonwealth's Instruction "1"

[19] Defendant challenges Commonwealth's Instruction "1" because, he says, it fails to advise the jury that, even though it may find aggravating circumstances, the death penalty is not mandatory.

Code § 19.2-264.4C provides that the death penalty shall not be imposed unless the Commonwealth proves one of the two aggravating circumstances beyond a reasonable doubt. The statute does not require that, upon such proof, the jury *must* impose the extreme penalty but only that, absent such proof, it shall *not* do so. By requiring the jury to consider circumstances both in aggravation of and in mitigation of the offense, the statute clearly contemplates that, notwithstanding a showing of the former, the jury is at liberty in consideration of the latter to recommend the lesser penalty. Such discretion in the sentencing authority is not constitutionally infirm. "Nothing in any of our cases suggests that the decision to

[4] These provisions are clearly in accord with the mandate of *Roberts* and *Woodson* as interpreted in *Lockett v. Ohio*, 438 U.S. 586,604 (1978), where Chief Justice Burger for the Court states:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [footnotes omitted].

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afford an individual defendant mercy violates the Constitution.'" *Gregg*, 428 U.S. at 199.

We agree that the instruction was not artfully drawn. Yet, we are of opinion that, read as a whole, it fairly expounds the thrust of the statute. Reciting the statutory command that the death penalty "shall not be imposed" absent a showing of aggravating circumstances, the instruction told the jury that it "may fix . . . punishment at death." What a jury "may" do it is at liberty not to do.

B. Rebuttal Argument by Commonwealth

[20] Defendant maintains that the trial court erred in permitting the Commonwealth to make a closing rebuttal during the penalty trial. That procedure, he says, "places undue emphasis on the aggravating circumstances".

The argument defendant makes was upheld in *People v. Bandhauer*, 66 Cal.2d 524, 530-31; 58 Cal. Rptr. 332, 336-37; 426 P.2d 900, 904-05, *cert. denied*, 389 U.S. 878 (1967), under the following rationale:

> The prosecutor's burden of proving guilt beyond a reasonable doubt at the trial on the issue of guilt justifies his closing the argument as well as opening it. At the trial on the issue of penalty, however, neither side has the burden of proving that one or the other penalty is the proper one in the case at hand, and there is no logical reason to favor one side over the other in argument.

But, as we have just noted, Code § 19.2-264.4C places upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt. For more than a century, the rule in Virginia has been that "the party having the affirmative of the issue has the right to open and conclude the argument before the jury". *Doss v. Commonwealth*, 42 Va. (1 Gratt.) 557, 560-61 (1844). In light of the statutory command, we decline to change the rule here.

[1] We reject the thesis that, because the statutory alternative to the capital penalty is one which permits parole, the sentencing authority is constitutionally overbroad. Surely, mercy by parole is not unconstitutional.

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V. PROPRIETY OF THE SENTENCE

A. Product of Passion

[21] Defendant urges us to commute the death sentence to imprisonment for life. The sentence, he says, was the product of "passion, prejudice, or other arbitrary factors". He reasserts his arguments that the photographs of the victim's body and the testimony of her daughter inflamed the passions of the jury. The same was true, he contends, of the repetitious reading of his confession, once during opening argument, once during the evidentiary portion of the guilt trial, and once during the penalty trial.

At the penalty trial, the Commonwealth introduced evidence, *inter alia*, that defendant had been previously convicted of an earlier crime of forcible rape and psychiatric testimony concerning the possibility that he might commit future crimes of violence. Confining himself to cross-examination of the Commonwealth's witnesses, defendant offered no independent evidence of circumstances in mitigation of the offense. In argument, the only mitigating factors stressed were defendant's good behavior during incarceration, the prospect of rehabilitation, and the probability that, if sentenced to prison for life, defendant "would be in his sixties before he would even be eligible for parole". The written verdict recited a finding of both aggravating circumstances. Although the jury was told that it might yet impose the lesser penalty, it unanimously recommended a penalty of death. Based upon its consideration of "all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant", the trial court entered final judgment confirming the penalty recommended by the jury.

We assume that the jurors were aroused by all they had heard and seen concerning conduct which they found to be "outrageously or wantonly vile, horrible or inhuman". And no doubt they were moved by the plight of a young daughter in the loss of her mother. Yet, we cannot say that, absent the trial incidents of which defendant complains, the jurors would have been less so or that they would have recommended a different penalty.

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We are, therefore, of opinion that the sentence imposed was not the product of invidious passion, prejudice, or other arbitrary factors but the product of a reasoned judgment grounded in the evidence and in accord with the law.

B. Excessiveness

[22] This Court is directed to determine whether the penalty imposed is "excessive or disproportionate to the penalty imposed in similar cases", and, in aid of that determination, we are empowered to "accumulate the records of all capital felony cases tried within such period of time as the court may determine."* Code § 17-110.1E (Cum. Supp. 1978).

On brief, defendant addresses this question in only two sentences. Although "there have been convictions for rape-murder in Virginia in recent years", he says, "no defendant has been subjected to the death penalty in Virginia in almost sixteen years."

Manifestly, since this is the first case to be reviewed under the 1977 law, no records of cases involving the particular crime charged in the indictment are available for comparison with the record here. Capital cases tried and reviewed under prior laws involved offenses definitionally different from the one at bar. Among a host of such cases, defendant cites none he considers fairly comparable to his case. Our own research has disclosed none in which a penalty less than death was imposed. On the other hand, we find that, of the 236 persons actually executed in the last seven decades, 232 had been convicted of murder or rape or murder in connection with rape. These figures do not, of course, include cases in which a death penalty initially imposed was set aside by the courts or commuted by executive clemency.

In consideration of the record as a whole and to the extent we can make a meaningful comparison with other capital cases decided in this Commonwealth, we hold that the penalty imposed in this case was not excessive or disproportionate. Finding no

* Pursuant to Code § 17-110.1E, we have this day entered an order directing the Clerk of this Court henceforth to segregate and accumulate the printed records and opinions in all class 1 felony cases, to maintain a current index of those cases, and to make the index, records, and opinions of this Court available for examination upon the request of any court of record in the Commonwealth or in the federal jurisdiction.

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reversible error in the court below, we will affirm the verdict of guilty and the sentence of death.

Affirmed.

APPENDIX A

The Statutory Complex (Cum. Supp. 1977)

§ 18.2-10. Punishment for conviction of felony. — The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

* * * *

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape.

* * * *

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

* * * *

§ 19.2-264.3. Procedure for trial by jury. — A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the

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indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

* * * *

§ 19.2-264.4. Sentence proceeding. — A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

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C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____ foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____ foreman"

(E) In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

* * * *

§ 19.2-264.5. Post sentence reports. — When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully

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advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideraton of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

* * * *

§ 17-110.1. Review of death sentence. — A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.

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* * * *

§ 17-110.2. Priority given to such review. — The Supreme Court shall, in setting its docket, give priority to the review of cases in which the sentence of death has been imposed over other cases pending in the Court.

APPENDIX B

Voir Dire of Mr. Piggott

[BY MR. PERSON, COMMONWEALTH'S ATTORNEY]

Q. And do you understand in the first hearing that the jury will determine guilt or innocence of the Defendant?

A. Right.

Q. And do you understand that in the second hearing, the second part of this trial, that the jury, if they find the Defendant guilty of capital murder, will be asked to fix his punishment at life imprisonment or death?

A. Yes.

Q. Now, do you have any religious or moral or conscientious scruples against giving somebody the death penalty in the proper case?

A. I would say yes.

Q. Yes. You couldn't give anybody the death penalty, could you?

A. No.

Q. All right. And in fact, no matter what the facts were in the case, you couldn't put somebody to death, could you?

A. No.

Q. Nor could you vote for somebody to die, could you?

A. No.

Q. All right. So you are absolutely against the death penalty, is that correct?

A. I think so.

[BY MR. WOOD, COUNSEL FOR DEFENDANT]

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Q. All right. Now, would the fact that you had to vote first of all on guilt or innocence initially, now before any sentence were imposed, what I am talking about just voting on one thing, that's guilt or innocence of the accused, would the fact that the person could either get life or death, would that influence your decision at all in voting for guilt or innocence?

A. No.

Q. It wouldn't influence you, is that correct?

A. It would not.

Q. Would the view that you hold about capital punishment compel you automatically solely on those views, would they compel you to vote not for the death penalty, or could you possibly vote for the death penalty?

A. Well, could you make that a little plainer. I didn't understand that too good.

Q. Okay. I assume from your answers, answering Mr. Person's questions, that you're somewhat opposed to the death sentence, is that correct?

A. Right.

Q. In the State of Virginia. All right. Would the views that you hold, that is your own personal feelings about the death penalty, would they compel you solely because of the views you hold about the death penalty, would they compel you, would that in other words, force you to vote for the death penalty, or could you possibly vote for the death penalty in a certain case depending on what the facts were, depending on what the evidence is in that particular case?

A. I guess I possibly could then, I guess. I don't know.

Q. Depending on what the facts are in any particular case, is that correct?

A. Yes.

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[BY MR. PERSON:]

Q. Mrs. Piggott, you understand now, and excuse me if I repeat myself because it's very important to get your answers correctly because this is the time when you can — you as a person can tell Judge Carneal that you don't agree with the law; that you don't agree with the death penalty in this case, no matter what the case is, that you don't agree with it and nothing will happen to you. This is one time you can do that and you can tell Judge Carneal that you don't agree with the death sentence under any circumstances because you just don't feel it's right, and nothing will happen. Now, is that the way you feel?

A. No, not exactly. But — I don't know. I don't like — you know — to hear of that but I guess something have to be done if you're wrong, I guess.

Q. Let me ask you this. To make myself perfectly clear, you understand that the first trial will be — the jury will determine whether the defendant is guilty or innocent, is that correct?

A. Right.

Q. Now, knowing that the Defendant might be given death, could you if the Commonwealth proves its case beyond a reasonable doubt and if it was a proper case, could you find the Defendant guilty, knowing that he might be given death later on, or would you have to find him not guilty?

A. Well, I guess if he's guilty, I'll have to.

Q. You could find him guilty, is that correct?

A. Yes.

Q. Now, once you found him guilty, there would be only two punishments.

A. Yes.

Q. One would be life imprisonment and the other would be death. All right.

A. Yes.

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Q. Now, if the Commonwealth proves its case beyond a reasonable doubt and it was a proper case, could you vote the death penalty for the Defendant?

A. I —

Q. Or would you have to give him life imprisonment?

A. I would say life.

Q. Life. All right. So no matter what — in the second half of the trial, after you found him guilty, in the second half of the trial, no matter what the Commonwealth evidence showed, and no matter what the law told you, you couldn't give a person death, is that correct? You'd have to give him life, is that correct?

A. Yes.

Q. So you are absolutely against the death penalty, is that correct?

A. Right.

Q. In any situation?

A. No.

Q. Is that correct?

A. Right.

[BY MR. WOOD:]

Q. Mrs. Piggott, you answered some questions for me before here, is that right?

A. Yes.

Q. Didn't you answer at that time that — when I asked you a question about whether or not you possibly could impose the death sentence in some case, depending on the facts of that case?

A. Yes.

Q. That in fact you said you possibly could, is that correct?

A. Yes.

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Q. Is that the way you feel, possibly you could. You wouldn't want to, but — but you possibly could?

A. Yes.

Q. So that your feelings are not absolute, is that correct?

A. Yes.

Q. That's correct?

A. Yes.

Q. You're not saying to Mr. Person and to the Judge that I don't care what kind of case it is, or how bad the case is, I absolutely could not impose it. You're saying you possibly could, is that correct?

A. Yes.

[BY MR. PERSON:]

Q. So you are saying no matter how difficult it might be and no matter how painful it might be, and no matter who might criticize you, that under certain facts and under certain circumstances, that you could in a proper case, if the Commonwealth proved its case beyond a reasonable doubt, and this is when you have the choice between life imprisonment and death —

A. Yes.

Q. Under those situations you could vote that the Defendant would get the death penalty, is that correct?

A. I thought I said lifetime.

Q. So you're absolutely against the death penalty, is that correct?

A. Yes.

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DOCTOR WENDELL PILE, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q Will you state your name and occupation and profession, please?

A Doctor Wendell Pile; I'm a psychiatrist at Hampton, Virginia.

Q And how long have you been a psychiatrist, Doctor Pile?

A I have been a psychiatrist since 1976 -- 1946.

Q Could you briefly tell the ladies and gentlemen of the jury your background in regard to education?

A I'm a graduate of the University Illinois Medical School in 1945, received my psychiatric training at Perry Point University Hospital, Eastern State Hospital, in Virginia, and received my boards in psychiatry in 1952; been in private practice of psychiatry since 1952, and past Director of the Mental Hygiene Clinic in Newport News. Now Medical Director of Bayberry Psychiatric

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Hospital.

Q Now, pursuant to an order of this Court, did you conduct an examination of the Defendant, Michael Marnell Smith?

A I did.

Q Is he in the Courtroom?

A He is.

Q Will you point him out to the ladies and gentlemen of the jury?

A The gentleman to my left, over there (indicating).

COURT: Let the record show he pointed to the Defendant.

BY MR. PERSON:

Q Did you talk to him in Hampton, Virginia?

A I did.

Q Do you remember what date you talked to him?

A It was October the 1st.

Q Did he tell you anything about the girl on the school bus?

A He did.

Q What did he say about that?

A He said --

MR. PUGH: Your Honor, I have a motion, if your Honor please, with respect to the -- what further testimony the Doctor is going to --

COURT: All right. Take the jury out.

(At this time, the jury retired to the jury room.)

COURT: All right, sir.

MR. PUGH: Your Honor, we're going to object to any testimony made by Doctor Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged.

COURT: Well, Mr. Pugh --

MR. PUGH: As well as the fact that -- I think that the Commonwealth has to lay the foundation as to what the Doctor instructed

Mr. Smith with respect to his rights to say anything to him.

COURT: I don't think the Doctor is an officer of the law; and certainly let me point out, first of all, Mr. Pugh, Doctor Pile was appointed at your suggestion to examine this man. You suggested Doctor Pile, as I recall it. Following your suggestion, I appointed him to examine this man.

MR. PUGH: That's not the question in issue.

COURT: If you will let me finish, Mr. Pugh, and I'll let you finish.

You, having done this, and Mr. Smith having talked to him, I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police

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officer does under the Miranda.

Secondly, as I interpret Section 19.2-22-64.4, it clearly reads "evidence which may be admissible, subject to the rules of evidence governing admissibility, may include tne circumstances surrounding the offense, the history and background of the defendant."

Now, how -- how is history and background obtained? The man writes his own history. Sometimes with his words and sometimes with his deeds, but he writes his own history. And whatever he says, whatever he says he did, that's one of the ways of knowing history. Certainly -- I think what he said to Doctor Pile is admissible.

What else do you want to say?

MR. PUGH: I don't have any further statement or

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comment on that. I just object.

COURT: Note --

MR. WOOD: I do have one brief matter in regards to another matter.

COURT: All right.

MR. WOOD: The Doctor -- has written a letter, as the Court knows, to the Court, of course, we got copies of it.

COURT: Yes sir.

MR. WOOD: And a comment was made in his letter in regards to any other previous rapes, and the comment that was made in his letter was that his lawyers had told him not to comment on anything like that.

MR. PERSON: I'm not going to --

MR. WOOD: Or words to that effect. I don't believe it would be proper for the Doctor to say that.

MR. PERSON: I'm not going to ask him that question.

COURT: I agree with you, Mr. Wood.

Any reference to what lawyers may have -- what he said with reference to what lawyers may have told him, Doctor Pile, would not be proper to tell to the jury.

MR. WOOD: Yes sir.

COURT: Your exception will be noted, Mr. Pugh.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

BY MR. PERSON:

Q Tell us what he told you, Doctor Pile.

A He explained that he was driving

a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.

MR. PERSON: That's all the questions I have.

COURT: All right. You may cross examine him, Mr. Pugh.

CROSS EXAMINATION

BY MR. PUGH:

Q Doctor Pile, you indicated -- you stated that you saw Michael Smith on October the 1st, is that correct?

A Right.

Q And how long a period of time did you converse with Michael Smith?

A I imagine about an hour. Usually my consultation is an hour.

Q Did you see him after that date?

A I did not.

MR. PUGH: Just a moment.

(At this time,

Mr. Pugh and Mr. Wood conferred.)

MR. GROSS (JUROR): When this incident that he described to the Doctor take place?

COURT: Did he advise you, Doctor, when it had taken place?

A While he was driving a school bus. I assume it was at a younger age, but I don't know the exact time.

BY MR. PUGH:

Q Doctor Pile, in your diagnosis, what was your diagnosis of Michael Smith?

A I felt he was - sociopathic personality, sexual deviation, rape.

Q What is that?

A A person who -- is also described as an antisocial personality. They're all sort of the same type of -- of personality disorder. The basically people who are unsocialized, and they're quite repeatedly in conflict with the Court. They don't seem to have any capability of -- of having loyalty to anybody, to any group or to any social values. Usually, they're rather irrespon-

sible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards what's right and what's wrong.

Q Do they have compulsions to commit crimes, Doctor?

A They will comit crimes, but it need not be a compulsion. They just have no -- they want to do what they want to do, irrespective of what the laws of the land are. Basically, they do what they will do to get -- enjoyment.

Q Over what period of time, if a person has this antisocial personality, what period of time would a person develop this behavior? Is it a year or two years or --

A No, frequently you see this start when they're in adolescence, and -- it's something that -- develops around the time of puberty, usually, but you can see it come out at other times.

Q Would you categorize this as being an -- an emotional illness or sickness?

A It's a -- form of a -- personality disorder or an -- inadequate personality that has nothing to do with whether he knows the difference between right and wrong, for instance. He does. But it's a -- a person who

is not like, I assume, most of us here, but he -- it's a personality disorder.

Q Well, do we have that personality disorder, the typical person?

A The typical person does not, no.

Q It's not average?

A No, it's not.

Q What type of treatment is available for a person with this type of disorder?

A Well, this is the type of person who is usually seen in Courts on trial, and when they're adjudged to be not insane, to know what they're doing, they're usually treated as a criminal, and the Court takes care of the punishment.

Q Let me --

COURT: Let him finish now, Mr. Pugh.

A There are, of course, cases who, with a personality disturbance, they are, hopefully, they can be some help in changing a personality; and a person like this, an attempt is made with psychiatric help and maximum security type pr ion or hospital, to see if something can be done.

BY MR. PUGH:

Q Would be your recommendation for

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treatment --

MR. PERSON: Judge, let me take something up outside.

COURT: Ladies and gentlemen.

(At this time, the jury then retired to the jury room.)

MR. PERSON: Judge, the ultimate issue in this whole case is life or death and I would object to -- to the -- Doctor Pile giving his opinion whether the man should be given life or given death.

COURT: Of course. Of course.

MR. PERSON: That's the reason. They asked him what his recommendation would be and I would assume that was the question he was eliciting.

MR. PUGH: I withdraw the question, Judge.

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COURT: All right.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

COURT: Any further questions?

MR. PUGH: Yes:

BY MR. PUGH:

Q Doctor, what causes a disorder of the type you diagnosed Mr. Smith had?

A I'm sure there are a lot of theories, what causes this type of condition, and -- I don't think there's any one that really knows. Like a lot of psychiatric conditions, we know the symptoms, and unfortunately we don't know the cause for a lot of them. And -- in this particular case, I would have no idea what the cause might be for his particular problem.

MR. PUGH: That's all I have.

COURT: Any further

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questions of the Doctor?

MR. PERSON: No sir.

COURT: Any further need for the Doctor?

MR. PERSON: No sir.

COURT: Doctor Pile, you may be excused.

MR. PERSON: Thank you, Doctor.

COURT: Who is next witness?

MR. PERSON: Doctor Dimitris.

- - -

DOCTOR JAMES C. DIMITRIS, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q State your name, please, sir.

A James Christian Dimitris. The

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INSTRUCTION NO. 1

The Court instructs the jury that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt that:

1. There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he has been found guilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim;

You may fix his punishment at death.

If you find that the Commonwealth has failed to prove either (1) or (2) above beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment.

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INSTRUCTION NO. A

The Court instructs the jury that when determining the punishment to be imposed for a conviction of capital murder, you shall consider the circumstances surrounding the offense, his history and back ground of defendant Michael Marnell Smith, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following: (i) the capital felony was committed while th. defendant was under the influence of extreme mental or emotional disturbance, or (ii) at the time of the commission of the capital felony, the capacity of defendant Michael Marnell Smith to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (iii) the age of defendant Michael Marnell Smith at the time of the commission of the capital offense.

INSTRUCTION NO. B

The Court instructs the jury that even though you [redacted] beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he has been found guilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim, after considering mitigating circumstances you may fix his punishment at life imprisonment.

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APP-65 Refused

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

MICHAEL MARNELL SMITH, Petitioner	)	FINDINGS OF FACT
V.	)	AND
EDWARD C. MORRIS, SUPT. MECKLENBURG CORRECTIONAL CENTER, Respondent	)	CONCLUSIONS OF LAW

On November 2, 1977, petitioner Michael Marnell Smith was convicted by a jury of capital murder following rape under Va. Code Ann. § 18.2-10(a) and -31(e) (Cum. Supp. 1977). On November 3, 1977, pursuant to the bifurcated capital trial proceedings prescribed by Va. Code Ann. § 19.2-264.2 et seq. (Cum. Supp. 1977) the jury recommended the sentence of death, which, after review, was imposed by this Court on November 30, 1977. The conviction and sentence were unsuccessfully appealed. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978); cert. denied, ___U.S.___, 99 S.Ct.2419, (1979). On June 22, 1979, petitioner filed a writ of habeas corpus with this Court, alleging ineffective assistance of counsel during his trial. For the reasons set forth below, the petition is denied.

As a predicate to his claims of inadequate assistance of counsel, petitioner urges this Court to adopt a standard of competency applicable to capital cases which is decidedly narrower than that applied to other criminal cases. While it is true, as petitioner asserts, that jury selection takes on great significance in a capital case, and that a separate evidentiary case must be prepared for the sentencing phase of the capital trial, the special tasks involved in such a case have been found to be within the competence required of counsel in other criminal

trials. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978); Harvin v. State, 582 S.W.2d 794 (Cr. App. Tex. 1978). Noting that petitioner cites no holdings to the contrary, and finding no indication that special qualifications beyond those in normal criminal trials are required of counsel in the bifurcated capital trial, I conclude that the standards of competency applicable to other criminal cases also apply to the capital case.

Thus, it would appear that petitioner's claims rest on the standard set forth in Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1973), where incompetent representation of counsel was said to occur "only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial." Id. at 705. Petitioner, however, bases his claim on the standard in Marzullo v. Maryland, 561 F2d 540 (4th Cir. 1977), which states that inadequate representation results from conduct "so flagrant that a court could conclude that [such conduct] resulted from neglect or ignorance rather than from informed, professional deliberation." Id. at 544. Resolving any difficulties arising from differences in the language employed by the two courts above, I conclude that under the standards pronounced by either court, petitioner received adequate assistance of counsel.

I

Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made during a pretrial psychiatric examination. On October 1, 1977, by order of this Court pursuant to petitioner's request for an

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evaluation by a psychiatrist of his own choosing, petitioner underwent a one-hour psychiatric examination by Dr. Wendell Pile. In a letter to this Court dated October 1, 1977, Dr. Pile described an account by petitioner of a previously undisclosed incident which occurred in his youth. The letter relates that petitioner, a school bus driver at the time, once tore the clothes off a girl, but on second thought, decided not to rape her. At the sentencing phase of the trial, petitioner's counsel objected to an attempt by the prosecution to elicit on direct examination this account by Dr. Pile on the grounds that during the examination Dr. Pile failed to inform petitioner that his statements could be used against him. This Court overruled, noting that Dr. Pile's examination occurred at petitioner's request.

Referring to the psychiatric examination itself, Dr. Pile, At the beginning of said examination, encouraged petitioner to make a full disclosure of the offense and any prior offenses. Petitioner advised Dr. Pile that his attorney had told him not to discuss the offense or any prior offenses in which he had been involved. Thereafter, Dr. Pile did not press petitioner for information, but during the interview petitioner told Dr. Pile of the incident on the bus as recited above.

Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

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Turning now to the case law discussed by petitioner in support of his first claim, petitioner refers to two recent decisions dealing with the issue raised. The first case, Tibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978) overturns the decision in Tibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975), in which the Supreme Court of Virginia held that the prosecution may use on the issue of guilt statements made without prior warning during a psychiatric examination, so long as the accused was not compelled to answer questions concerning the offense with which he was charged. The court in Tibson v. Zahradnick, supra, disagreed, reasoning that an adequate evaluation of an accused's sanity at the time of the offense or of his competency to stand trial cannot be made absent a candid disclosure to the examiner of the facts surrounding the offense. Thus, the court held that in order to preserve his Sixth Amendment right to explore these psychological defenses, the incriminating statements an accused makes concerning the offense may not be used by the prosecution to prove his guilt. To adapt this holding to the present case, petitioner analogizes that proof of guilt in a normal criminal trial is the functional equivalent of the prosecution's proof of case-in-aggravation in the sentencing phase of a capital trial.

The second case, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), involves the introduction of psychological testimony during the sentencing phase of a bifurcated capital trial. There, on the trial court's motion the prosecution obtained a psychiartic examination of the accused, but failed to inform him before or during the examination of his Fifth Amendment right against self incrimination. Having never disclosed the existance

of this examination to the defense, the prosecution called the psychiatrist to testify on the issue of dangerousness in support of the state's case-in-aggravation. The court, supra, held the testimony inadmissible on two grounds: first, its introduction constituted unfair surprise, and second, in the absence of a warning against self-incrimination, the accused made no voluntary waiver of his Fifth Amendment rights.

Focusing on the merits of the first claim, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal. Gibson v. Zahradnick, supra, narrowly considers the admissibility of statements relating directly to the circumstances of the offense charged, and their use by the prosecution to prove guilt. It does not consider the use of statements to prove mental state, nor does it draw the analogy between proof of guilt and proof of case-in-aggravation.

Further, since unfair surprise is not in issue in the present case, Gibson v. Zahradnick forecloses further argument based on Smith v. Estelle, supra. The alternative analysis employed in Smith v. Estelle with regard to the admissibility of incriminatory statements is the same Fifth Amendment voluntariness of waiver analysis that the Supreme Court of Virginia employed in Gibson v. Commonwealth, supra, and which was ultimately rejected in Gibson v. Zahradnick. The court in Gibson v. Zahradnick reasoned instead that the Sixth Amendment right to explore psychological defenses demands a full inquiry, uncompromised by the threat of self incrimination, into defendant's mental state. The court's holding that the prosecution is prohibited from using such incriminatory

statements to prove defendant's guilt was based on a finding that defendant's Sixth Amendment rights were violated, and not on a finding of absence of voluntary waiver.

More importantly, however, both Gibson v. Zahradnick and Smith v. Estelle were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. Further, testimony shows that an assistant of counsel conducted research on the Fifth Amendment issue, but that his unpromising results led counsel to decide not to appeal. [Evidentiary hearing tr. at 270 and 274.] In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and that this decision resulted from informed, professional deliberation in conformity with the standards of competence discussed above.

In another claim relating to statements made during the psychiatric examination, petitioner contends that his counsel incompetently failed to recognize the conflict between his advice to petitioner to remain silent about the offense charged and his attempt through psychiatric examination to explore possible psychological defenses. Petitioner's claim presumes that such defenses cannot be probed in the absence of statements by the accused concerning the circumstances surrounding the offense. On this issue, the opinions of expert witnesses were in opposition [Evidentiary hearing tr. at 80 and 180 - 182], as appear to be the underlying presumptions in the decisions of Gibson v. Zahradnick

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and Smith v. Estelle, discussed supra. I find adequate support for counsel's conduct within the present state of disagreement, both in the medical and legal professions, on this matter. I thus conclude that counsel's advice to petitioner to remain silent about the offense during his psychiatric examinations was not inadequate representation under the Slayton or Marzullo standards quoted above.

II

Petitioner's second claim relates to his counsel's cross examination of Dr. Pile during the sentencing phase of the trial. On cross, petitioner's counsel, after a few preliminary questions, asked Dr. Pile for his diagnosis of petitioner's mental condition. The doctor responded "I felt he was a sociopathic personality, sexual deviation, rape." [Trial tr. at 934] Petitioner notes that his counsel testified that he was "shocked" upon first reading this diagnosis in Dr. Pile's October 1, 1977 letter to this Court [Evidentiary hearing tr. at 25], that counsel testified that he entertained doubts about the adequacy of Dr. Pile's evaluation based on a one-hour examination [Evidentiary hearing tr. at 25], and that counsel was later uncertain why he had asked for Dr. Pile's diagnosis on cross examination [Evidentiary hearing tr. at 25 and 25]. From this testimony, petitioner contends that his counsel incompetently asked questions which were damaging and void of strategic purpose.

Petitioner further refers to expert opinion [Evidentiary hearing tr. at 9], medical literature, and dicta in Smith v. Estelle, supra, for the proposition that Dr. Pile's one-hour examination was insufficient to establish a diagnosis of sociopath.

and that a minimum of research would have provided his counsel with authority discrediting the predictive value of a medical prognosis of future criminal conduct. Noting that petitioner's counsel testified that he had done no research in connection with the cross examination of Dr. Pile [Evidentiary hearing tr. at 274], petitioner contends that his counsel inadequately prepared for the cross examination.

Petitioner finally asserts that Dr. Pile's testimony prejudiced the jury, noting that two jurors inquired about the characteristics of the sociopathic personality [Trial tr. at 952 - 955], that the prosecution referred to Dr. Pile's diagnosis in its closing argument [Trial tr. 1072 and 1077], and that the jury did not delete the finding of "dangerousness" from its verdict recommending the death sentence.

While petitioner's counsel may have been uncertain at the evidentiary hearing why he questioned Dr. Pile as he did, I find that the trial transcript adequately explains the reasons behind his inquiries. During his cross examination of Dr. Pile, petitioner's counsel inquired as to 1) whether sociopaths have compulsions to commit crimes [Trial tr. at 937], 2) the causes of the sociopathic personality [Trial tr. at 940], 3) the length of time it takes to develop such a condition [Trial tr. at 937], 4) whether the condition could be categorized as an emotional illness or sickness [Trial tr. at 937], and 5) whether such a condition can be treated [Trial tr. at 938 and 939]. In addition, during his closing statement petitioner's counsel argued that petitioner was suffering from an illness that he could not help

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[Trial tr. at 1082 and 1091] and asked the jury to give him the opportunity to obtain treatment [Trial tr. at 1084 and 1086], which the Court finds to be reasonable trial strategy in light of the confession of the petitioner and the overwhelmingly aggravating facts exhibited by testimony in the case.

I find that through this line of questioning, which was repeated on the cross examination of Dr. Dimitris, who had also examined petitioner [Trial tr. at 948, 950 and 951], petitioner's counsel attempted to establish the statutory mitigating factor of extreme mental or emotional disturbance, Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977), his only reasonable defense. Counsel was constrained to prove that petitioner's mental condition was defective. I find that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated. The necessity of placing petitioner's mental state in question, not counsel's incompetence, produced the prejudicial statements. In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978), the court recognized that the introduction of prejudicial testimony in proof of an insanity defense does not by itself constitute inadequate representation of counsel.

Furthermore, Dr. Pile's testimony was not entirely prejudicial or void of strategic value. On the crucial question of the likelihood of future criminal conduct, Dr. Pile's testimony that in certain cases a sociopathic personality can be treated actually weighed in petitioner's favor [Trail tr. at 938]. I thus conclude that counsel's cross examination was the product of informed, professional deliberation, and thus competent under the standards discussed supra.

As to petitioner's contention that Dr. Pile's one-hour examination constituted insufficient clinical predicate for his diagnosis, I find that the expert opinion was equivocal and in basic disagreement over this point [Evidentiary hearing tr. at 66, 90, 204 and 205]. Further, authority questioning the validity of psychiatric predictions of future criminal behavior, while promising for impeachment purposes, would only have undermined Dr. Pile's favorable testimony concerning the possibility of treatment. I conclude then that counsel was competent in not raising these matters during the trial.

III

Petitioner contends that counsel failed to conduct an adequate investigation of the statutory defense of mitigating mental abnormality. Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977). Petitioner refers to United States v. Walker, 537 F.2d 1192 (4th Cir. 1976), and United States v. Taylor, 437 F.2d 371 (4th Cir. 1971), for the proposition that a psychological evaluation performed for one purpose is not sufficient for another purpose, and asserts that since the examining psychiatrists were only requested to evaluate petitioner with regard to his competency to stand trial and to his sanity at the time of the offense, the scope and focus of their investigations were inadequate to explore the statutory mitigating mental conditions. From this, petitioner claims that counsel failed to take adequate steps to prepare the case-in-mitigation, and concludes from the decisions of Wood v. Zahradnick, 570 F.2d 980 (4th Cir. 1978), and

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Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), that counsel's conduct was incompetent.

United States v. Walker, supra, and United States v. Taylor, supra, hold that an examination sufficient to determine competency to stand trial will not serve for an examination sufficient to determine sanity at the time of the offense. The cases note that the former examination requires only a limited investigation of defendant's present state of mind, while the latter requires analysis of defendant's personality at the time of the offense. I do not find, however, that such a difference exists between the examinations petitioner received and an examination sufficient to explore the statutory defenses under Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977).

The mitigating mental factors to be considered under the statute revolve around petitioner's mental state at the time of the offense, a question on which both examinations focused. On this point, both examining doctors testified that their examinations were sufficient to render an opinion concerning the statutory mitigating mental conditions [Evidentiary hearing tr. at 31 and 215]. I thus find that petitioner was adequately examined with regard to the statutory defenses.

Petitioner's use of Wood v. Zahradnick and Brennan v. Blankenship, supra, is inapposite here since both decisions rest on a complete failure to explore available psychological defenses. In addition, in light of the testimonies of the examining psychiatrists that no evidence was found to support a defense of mitigating mental conditions [Evidentiary hearing tr. at 32, 215 and 216], I find that petitioner suffered no pre-

judice from counsel's failure to direct the psychiatric examinations toward these issues. I thus conclude by the standards quoted above that counsel conducted a competent investigation of mitigating mental circumstances.

IV

Petitioner's fourth claim asserts that during the sentencing phase of the trial counsel failed to prepare and request adequate jury questions regarding 1) the meanings of the terms "probability" and "serious act of criminal violence" as found in Va. Code Ann. § 19.2-264.4(C) (Cum. Supp. 1977), 2) the parole guidelines employed in the release of a prisoner incarcerated for life, and 3) the credibility of witnesses, the burden of proof, and the meaning of the term "beyond a reasonable doubt."

In regard to the first of these, the Supreme Court of Virginia has determined that definitional instructions are not necessary for the jury's comprehension of the terms in § 19.2-264.4 (C). Clark v. Commonwealth, 220 Va. ___, 257 S.E.2d 784 (1979). Counsel cannot be incompetent for failing to request an unnecessary instruction. The second of the above instructions was found to constitute reversible error in Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978). Failing to request an erroneous instruction is not inadequate representation. Concerning the last of these, I find that the jury was adequately informed of the concepts and terms requested, since instructions had been given on each of them during the guilt phase of the trial, which had concluded the day before. I therefore reach the conclusion that petitioner's counsel rendered adequate assistance under the standards enunciated above in not requesting the above instructions during the sentencing phase of the trial.

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Present: All the Justices

LEM DAVIS TUGGLE, JR.

OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

v. Record No. 840486

September 6, 1985

COMMONWEALTH OF VIRGINIA

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This case is before us again, having been remanded from the Supreme Court of the United States. In the guilt phase of a bifurcated jury trial, Lem Davis Tuggle, Jr., was convicted of capital murder for the willful, deliberate, and premeditated murder of Jessie Geneva Havens during the commission of, or subsequent to, rape. Code § 18.2-31(e). In the penalty phase, the jury returned a verdict fixing Tuggle's punishment at death. By so doing, the jury found that the Commonwealth had proved both the "dangerousness" and "vileness" predicates beyond a reasonable doubt. The trial court confirmed the jury's verdict and sentenced Tuggle to death. We affirmed his conviction and sentence. Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984).

Tuggle petitioned the Supreme Court of the United States for a writ of certiorari, and on May 13, 1985, in a summary disposition, the Supreme Court granted certiorari, vacated the judgment, and remanded the case to us "for further consideration in light of Ake v. Oklahoma, 470 U.S. ____ (1985)." Tuggle v. Virginia, 471 U.S. ____ (1985). Thereafter, we directed counsel to brief and argue the question of Ake's impact on Tuggle's conviction and sentence.

When we decided Tuggle, a state was not required to furnish a criminal defendant an independent psychiatrist. The Constitution required only that an accused's sanity be evaluated by a neutral examiner. United States v. Baldi, 344 U.S. 561 (1953). In Ake, however, the Supreme Court recognized for the first time that, in certain circumstances, a state is constitutionally required to provide an indigent defendant with the assistance of a psychiatrist.

More specifically, the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." 470 U.S. at ____. Additionally, the Court held that when "future dangerousness [is] a significant factor at the sentencing phase" of a capital murder case, due process requires that an indigent defendant be entitled to psychiatric assistance on that issue. 470 U.S. at ____. Thus, our task is to determine the effect of the Ake holdings upon Tuggle's conviction and sentence.

I

The facts relevant to the present inquiry are undisputed. Initially, Tuggle filed a motion in the Smyth County General District Court requesting two mental evaluations. One evaluation, pursuant to Code § 19.2-169.1, would determine Tuggle's "capacity to understand the proceedings against him or to assist his attorney in his own defense." The other evaluation, pursuant to Code § 19.2-169.5, would determine whether Tuggle was sane at the time of the offense. The motion alleged that Tuggle had been in the Commonwealth's

penal system f.. a number of years, that h as the subject of a number of psychological evaluations and tests during his confinement, and that, in approximately 1971, he was evaluated at Southwestern State Hospital for mental defects or disorders and had not been informed of the results. The general district court judge denied the motion, finding no probable cause to believe that Tuggle was incompetent to stand trial or insane at the time of the offense.

Shortly after Tuggle was indicted, he moved the trial court for an examination pursuant to Code § § 19.2-169.1 and -169.5, relying upon the reasons previously stated. The Commonwealth's Attorney neither concurred in nor opposed the motion. Although no evidence was presented to the court in support of the motion, the court granted it solely because "this is a capital murder case."

Pursuant to the court's order, Tuggle was admitted to Central State Hospital for evaluation on November 22, 1983. Tuggle's psychiatric evaluation was conducted by Miller M. Ryans, M.D., a forensic psychiatrist, and Arthur Centor, Ph.D., a licensed clinical psychologist. On December 1, 1983, Doctors Ryans and Centor reported to the court that Tuggle was competent to stand trial and that he was sane at the time of the offense. The doctors also stated that they had formed an opinion respecting Tuggle's probability of future dangerousness, but did not report their opinion because it had not been requested.

The report reads in pertinent part:

> On the basis of psychiatric interview, psychiatric evaluation, psychological interview, psychological testing, psychological evaluation, neurological examination, encephalographic examination (EEG), reports of ward

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> behavior, and other available information, we are of the opinion that [Tuggle] is competent to plead and stand trial in that he does not lack substantial capacity to understand the proceedings against him or to assist in his own defense.
>
> We are also of the opinion that [Tuggle] was competent at the time of the alleged crime or crimes in that he was not suffering from a defect of reason due to disease of the mind or defect of the mind and knew the nature, character and consequences of his acts and the difference between right and wrong. Furthermore, we are of the opinion that [Tuggle] was not suffering from a loss of volition due to disease of the mind or defect of the mind at the time of the alleged crime or crimes; he was not suffering from an irresistible impulse.
>
> Because [Tuggle] is charged with a capital crime, we advised him of his Miranda Rights to have counsel present as well as the other Miranda Rights relative to the substance of our interviews being used at a hearing if he is convicted of capital murder. [Tuggle] waived his Miranda Rights and signed such a waiver. We have formed an opinion as to the issue of the probability of future dangerousness but we are not reporting it to the Court at this time because we were not requested to do so.

On December 27, 1983, Tuggle's counsel moved for an examination by C. Robert Showalter, M.D., a forensic psychiatrist, to determine Tuggle's sanity at the time of the offense and his competency to stand trial. Counsel based the motion on the belief that Tuggle was "entitled to be examined by a psychiatrist or group of psychiatrists chosen by counsel for the Defendant because of the seriousness of the charges heretofore lodged against the Defendant." (Emphasis added.) Following argument on January 3, 1984, the trial court denied the motion. The court observed that Tuggle previously had been evaluated at his own request, that the trial date was close at hand (14 days), and that logistical problems would cause a further evaluation to be cursory at best. The trial judge stated that he had previously "granted the motion for an evaluation because of the seriousness of the case." (Emphasis added.)

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We affirmed this ruling, noting that Tuggle did not premise his request for a private psychiatrist upon a need to rebut evidence of future dangerousness. 228 Va. at 503, 323 S.E.2d at 544-45. Additionally, we held that whether a second evaluation was warranted was "a matter resting within the sound discretion of the trial court, and that no abuse of discretion had been shown. Id. at 503, 323 S.E.2d at 545.

Neither party presented psychiatric evidence at the guilt phase of Tuggle's trial. At the penalty phase, however, Dr. Center testified that Tuggle "shows a high probability of future dangerousness." Tuggle objected to this testimony solely on the ground that he was examined without the benefit of counsel. We rejected this contention, concluding that Tuggle voluntarily, knowingly, and intelligently waived his right to counsel. 228 Va. at 515, 323 S.E.2d at 552.

II

First, we consider the effect of Ake on the guilt phase of Tuggle's trial. As previously noted, the Supreme Court held that a state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" when the defendant "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." 470 U.S. at ____. Thus, before an indigent defendant is entitled to such psychiatric assistance, he must make a "threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." Id.

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These are the facts in Ake: Ake was charged with murdering a couple and wounding their two children. During pre-arraignment confinement and at arraignment, which was just four months after the offenses, Ake's behavior was so bizarre that the trial judge sua sponte ordered him to undergo a psychiatric examination. A psychiatrist diagnosed Ake as a probable paranoid schizophrenic and recommended an extensive psychiatric evaluation to ascertain whether Ake was competent to stand trial. The psychiatrist reported: "At times [Ake] appears to be frankly delusional . . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven."

Thereupon, Ake was committed to an Oklahoma state hospital for an examination respecting his competency to stand trial. The chief forensic psychiatrist at the hospital advised the court that Ake was not competent to stand trial. The court then conducted a competency hearing, at which a psychiatrist testified:

> [Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia--chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous . . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within--I believe--the State Psychiatric Hospital system.

The court found that Ake was incompetent to stand trial and committed him to the state mental hospital.

Six weeks later, the chief forensic psychiatrist advised the court that Ake had become competent to stand trial. Ake was taking 200 milligrams of Thorazine, an antipsychotic drug, three

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times daily. ...e psychiatrist informed th :ourt that if Ake continued taking that dosage of Thorazine, his condition would remain stable. The State then resumed prosecution of Ake.

At a pretrial conference, Ake's counsel informed the court that Ake would raise an insanity defense. Ake's attorney claimed that a psychiatrist would have to examine Ake regarding his mental condition at the time of the offense for the attorney to adequately prepare and present an insanity defense. Although Ake was confined to the state hospital for three months, no inquiry had been made into his sanity at the time of the offense, and Ake was an indigent who could not afford to pay for a psychiatrist. His attorney requested that the court either arrange for a psychiatric examination or provide funds to allow the defense to arrange an examination. The trial judge denied both requests.

At the guilt phase of his trial, Ake's sole defense was insanity. Although his counsel questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none examined him on that point. The prosecution then asked each psychiatrist if he had performed or seen the results of any examination diagnosing Ake's mental state at the time of the offense. Each doctor replied that he had not. Thus, no expert testimony concerning Ake's sanity at the time of the offense was introduced for either side.

The court informed the jurors that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They were also instructed that Ake was to be presumed sane at the

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time of the crime unless he presented evidence sufficient to raise a reasonable doubt about his sanity at that time. The jurors were told that if Ake raised such a doubt in their minds, the burden of proof to prove sanity beyond a reasonable doubt shifted to the State. By its verdict of guilty on all counts, the jury rejected Ake's insanity defense.

The State requested the death penalty at the sentencing proceeding. Neither side presented new evidence. The prosecutor, in establishing the likelihood of Ake's future dangerous behavior, relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society. Ake did not have an expert witness to rebut this testimony. By its verdict, a jury sentenced Ake to death on each of the two murder counts. The jury also sentenced him to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

The facts of Ake clearly establish that Ake demonstrated to the court that his sanity at the time of the offense would be a significant factor at trial. His bizarre behavior at arraignment and while in jail prior to arraignment caused the trial judge sua sponte to order a psychiatric examination. The court found that Ake was mentally ill and incompetent to stand trial less than six months after he committed the offenses. There was abundant evidence presented to support this finding and none to refute it.

As the Supreme Court observed, Ake made a "threshold showing to the trial court that his sanity

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[was] likely to be a significant factor in his defense." Indeed, insanity was his only defense. Nevertheless, Ake was never examined for an evaluation of his mental state at the time of the offense. Thus, Ake never was afforded the opportunity to obtain and present the only evidence germane to his defense, i.e., "the ability to distinguish right from wrong at the time of the alleged offense." 470 U.S. at ____.

Tuggle's facts pale when they are contrasted with Ake's. Throughout the trial, the court had an opportunity to observe Tuggle's appearance and demeanor. Nothing in the record suggests any bizarre behavior by him in court or that counsel claimed such behavior ever occurred at other times and places. Had counsel been aware of any abnormal conduct, it is reasonable to believe that they would have reported it. They made no such report. On the other hand, the report of Doctors Ryans and Centor indicates that they thoroughly examined and evaluated Tuggle and states unequivocally that he was sane at the time of the offense and competent to stand trial.

It is true that Tuggle received psychiatric testing while in the Commonwealth's penal system, but such examinations are routine. Tuggle never attempted to introduce the test results; thus, the trial court reasonably could assume that they would not support his motion. Indeed, when Tuggle requested a private psychiatrist, he made no showing to the trial court that his sanity was likely to be a significant factor in his defense. Nothing was presented except the motion containing counsel's conclusory statement that Tuggle was "entitled to be examined by a psychiatrist

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or group of psychiatrists chosen by counsel or the Defendant because of the seriousness of the charges." Ake makes clear, however, that an indigent defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U.S. at ____.

Tuggle contends, nevertheless, that merely by ordering the psychiatric examination pursuant to Code §§ 19.2-169.1 and -169.5, the trial court, as a matter of law, found probable cause. Thus, he argues, the probable cause standard is the equivalent of the threshold "significant factor" test in Ake.

It is true that these two statutes provide for an examination if "the court finds, upon hearing evidence or representations of counsel, that there is probable cause" to believe either that a defendant lacks competency to stand trial, Code § 19.2-169.1, or that he was affected by mental disorders at the time of the offense, Code § 19.2-169.5. The record is clear, however, that counsel did not make such a showing to the court either by evidence or representations. The court ordered the examination solely because "this is a capital murder case."

We conclude that Tuggle failed to make the requisite Ake threshold demonstration. He did not demonstrate to the trial judge that his sanity at the time of the offense would be a significant factor at trial. We hold, therefore, that when its ruling is reexamined in light of Ake, the trial court did not err in denying Tuggle's request for an independent psychiatrist to assist in his defense in the guilt phase of his trial.

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III

Next, we consider Ake's effect on the penalty phase of Tuggle's trial. Ake holds that when the prosecution in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, due process requires that a state provide the defendant the assistance of a psychiatrist on the issue. 470 U.S. at ____. In Tuggle, the Commonwealth presented psychiatric evidence that Tuggle "shows a high probability of future dangerousness."[1] Therefore, even though Tuggle's trial and direct appeal before us predated Ake, we conclude in light of Ake that the trial court erred in denying Tuggle's motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness.[2]

Our inquiry, however, does not end here. The General Assembly has provided that the death penalty shall not be imposed on one convicted of capital murder unless the Commonwealth proves beyond a reasonable doubt (1) "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society," or

[1] Tuggle did not object to the admissibility of this evidence on the ground that he had been denied access to an independent psychiatrist. Instead, he objected on the ground that the psychiatric examination was performed without the benefit of counsel. We rejected this contention because Tuggle voluntarily, knowingly, and intelligently had waived his right to counsel. 228 Va. at 515, 323 S.E.2d at 552.

[2] We note, however, that Tuggle never requested a psychiatrist to rebut future dangerousness, but only to reevaluate him as to sanity and competency to stand trial. 228 Va. at 503, 323 S.E.2d at 544-45.

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(2) "that his conduct in committing the of nse was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Code § 19.2-264.4(C); see also Code § 19.2-264.2. The first of the above-stated aggravating factors is the so-called "dangerousness" predicate. The second is the so-called "vileness" predicate. Therefore, when either predicate is proved beyond a reasonable doubt, a jury may impose the death penalty.

The trial court permitted the jury to consider both aggravating factors under an instruction which parallels the statute.[3] The jury found that both the "dangerousness" and

[3] The instruction reads:

> You have convicted the defendant of an offence which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> (1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

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"vileness" predicates had been proved beyond a reasonable doubt.[4] Thereafter, pursuant to Code § 19.2-264.5, the trial court ordered a thorough investigation into Tuggle's history to determine whether the death sentence was appropriate and just. After considering the report and additional evidence, the court confirmed the verdict and sentenced Tuggle to death.

We reviewed Tuggle's death sentence as mandated by Code § 17-110.1. In doing so, we recited certain facts which are also relevant here:

> Approximately 9:30 a.m. on June 2, the investigator went to the place where Tuggle said Havens would be found. He found Havens' body at the site. Havens was clad in jeans "down around her knees," a blue and white striped blouse "pulled up to about the armpits," and "black silk panties . . . rolled down somewhat." A portion of the victim's pantyhose was "sticking out of the top" of her jeans, and one of her legs was out of the pantyhose.
>
> An autopsy revealed that the victim's body had an abrasion and a bruise on the left frontal area of the forehead, a small abrasion on the right frontal area of the forehead, an abrasion on the neck, a bite mark on the lower, inner quadrant of the right breast, a number of small bruises on the upper, inner aspect of the right arm, and a bruise on the right thumb and right wrist. Havens also had sustained a large bruise on the upper, inner thigh, bruises on the vaginal vault at the posterior aspect and near the bottom, and a gunshot wound in the chest.

---

[4] The sentencing verdict reads:

> We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Jessie Geneva Havens during the commission of, or subsequent to, rape and having unanimously found after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society,
>
> and
>
> having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind and aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> /s/ Robert C. Brown
> FOREMAN

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> According to the medical examiner the bruises of the vagina indicate penetration of the vaginal vault by something, a penis, a finger, an object, something." The medical examiner testified that both the bite mark on the breast and the bruising around the vagina occurred while Havens was alive. He also testified that no semen or spermatozoa was found in Havens' vagina, but that semen was found in the rectum, indicating "penetration and ejaculation into the rectum."
>
> A forensic odontologist testified that he examined the bite mark on the victim's right breast. He compared the mark with models of Tuggle's teeth and concluded "with all medical certainty these marks on the body of Ms. Havens were made by the teeth of Mr. Tuggle." He further opined that Havens was alive and moving when she was bitten.

228 Va. at 501-02, 323 S.E.2d at 544. We concluded that Tuggle's conduct in committing the offense "was outrageously vile and involved depravity of mind." 228 Va. at 517, 323 S.E.2d at 554. We also opined that "the battery to the victim was aggravated and 'more culpable than the minimum necessary to accomplish an act of murder.'" Id.

When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence. Zant v. Stephens, 462 U.S. 862 (1983); see also Poyner v. Commonwealth, 229 Va. ____, ____, 329 S.E.2d 815, 830 (1985).

In Zant, Stephens was found guilty of murder and sentenced to death under Georgia law. The jury based its verdict upon three specific statutory aggravating circumstances, any of which could support the death penalty. The Supreme Court of Georgia, in a later case, invalidated one of the aggravating circumstances found to exist in Zant, because it was unconstitutionally vague.

In a state habeas proceeding, the Supreme Court of Georgia held that Stephens' sentence was valid because it was supported by the other aggravating circumstances. In a federal habeas proceeding, the United States Court of Appeals for the Fifth Circuit set aside Stephens' death sentence. The Supreme Court reversed. It agreed with the Supreme Court of Georgia that the sentence was valid and reinstated Stephens' sentence because it was supported by the remaining two aggravating circumstances. 462 U.S. at ____.

In Tuggle, the jury made a separate, specific finding that the "vileness" predicate had been proved beyond a reasonable doubt. Although Ake requires the conclusion that the trial court erred in denying Tuggle an independent psychiatrist once the Commonwealth had submitted psychiatric evidence on the issue of future dangerousness, we hold, nonetheless, that the error neither impairs nor invalidates the jury's finding of vileness.

Accordingly, we reaffirm Tuggle's conviction and sentence.[5]

Affirmed.

[5]The Attorney General suggests that the trial court's error requires that the case be remanded for resentencing. This court, however, is not bound to accept the suggestion of a party concerning a question of law. Orloff v. Willoughby, 345 U.S. 83, 87, reh'g denied, 345 U.S. 931 (1953).

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NO. 85-5487 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM G. BROADDUS
Attorney General of Virginia

JAMES E. KULP*
Senior Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

(804) 786-6565

*Counsel of Record

QUESTIONS PRESENTED

1. Whether Petitioner is entitled to have his Fifth Amendment claim considered by federal courts where he failed to raise the claim pursuant to state procedural rules.

2. Whether the Fifth Amendment is implicated when the state introduces testimony of Petitioner's volunteered statement to a private psychiatrist.

3. Whether Petitioner received the effective assistance of counsel during sentencing.

4. Whether the instructions during the sentencing phase were adequate.

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NO. 85-5487

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR,
DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Michael Marnell Smith was convicted by a jury on November 2, 1977, of the capital murder and rape of Audrey Jean Weiler. The following day, pursuant to the bifurcated trial procedure, the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's verdict and entered final judgment on November 30, 1977.

The Supreme Court of Virginia granted Smith an automatic appeal, and after full briefing and argument, affirmed his conviction and sentence of death in a written opinion on October 6, 1978. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). This Court denied a petition for a writ of certiorari on May 21, 1979. 441 U.S. 967 (1979).

Smith thereafter filed a petition for a writ of habeas corpus in the trial court. The trial court denied all issues, except the claim of ineffective assistance of counsel, on the

grounds they had been previously decided or were procedurally barred. An evidentiary hearing was conducted by the trial court on November 8, 1979, and the trial court issued written findings of fact and conclusions of law denying Smith's petition on March 14, 1980.

The Supreme Court of Virginia denied Smith's appeal on April 24, 1981, and this Court again denied certiorari on December 14, 1981. 454 U.S. 1128 (1981).

Smith then filed a petition for a writ of habeas corpus in the United States District Court on June 28, 1982. The United States Magistrate issued several reports and recommended the petition be denied. After reviewing Smith's objection to the Magistrate's various reports, the District Court entered an order on December 4, 1984, denying the petition.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas corpus in an opinion of May 10, 1985. A petition for rehearing and suggestion for rehearing en banc were denied on June 26, 1985, no member of the Court requesting a poll on the suggestion for rehearing en banc. Petitioner's execution is scheduled for October 24, 1985.

STATEMENT OF FACTS[1]

In the early afternoon of May 23, 1977, Smith left his home and went for a walk on a beach which ran along the James River. He observed Audrey Jean Weiler also walking on the beach. Smith approached Mrs. Weiler, and after a short conversation, placed his arm around her waist and forced her into a wooded area. Smith pulled a knife and forced Mrs. Weiler to disrobe. Despite her pleas to be left alone, Smith raped her. After the rape Smith stated to choke Mrs. Weiler as she begged for her life. When she became limp, he dragged her into the water where he

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[1]Petitioner is not contesting the guilt phase of his trial. Petition, page 5. The facts concerning the offense will therefore be stated briefly to allow the Court to be familiar with the offense.

submerged her head. Smith then stabbed her in the back several times. A medical examination found the cause of death was attributable to three clusters of lethal injury: asphyxia, drowning, and multiple stab wounds.

David F. Pugh was appointed to represent Smith on May 26, 1977, and he immediately requested a psychiatric examination by Dr. Palmaz, who was of the opinion Smith was competent to stand trial. Mr. Pugh requested an additional examination and Smith was hospitalized at the Forensic Unit of Central State Hospital from July 5 to August 23, 1977. Dr. Dimitris diagnosed Smith as having an "inadequate personality," and concluded that he was sane at the time of the offense.

Mr. Pugh then requested the Court to allow Smith to be examined by Dr. Wendell Pile, a private psychiatrist. Dr. Pile diagnosed Smith as a "sexually deviant sociopath." Dr. Pile also reported an incident which had been volunteered by Smith involving an assault on a girl on a school bus.

During the sentencing phase of the trial the Commonwealth called Dr. Pile to relate the school bus incident, and Dr. Dimitris to give his opinion on Smith's competency to stand trial and sanity at the time of the offense. Smith examined each psychiatrist about his diagnosis and presented numerous witnesses in mitigation.

SUMMARY OF ARGUMENTS AGAINST GRANTING CERTIORARI

Petitioner's Fifth Amendment claim is not properly before this Court due to procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977). The district court refused to consider this claim, and the Fourth Circuit avoided confronting this procedural issue since it found that Petitioner was nonetheless not entitled to any relief.

The Fifth Amendment is not implicated in this case, since the testimony complained of came from a private psychiatrist who was not an agent of the state. Estelle v. Smith, 451 U.S. 454

(1981). Furthermore, Petitioner's statement was not the result of any compelling influence but was voluntarily given despite the repeated warnings from his attorneys to remain silent.

Petitioner's sentence of death was based upon two separate and independent aggravating factors, one of which is not challenged. The Fourth Circuit properly concluded Zant v. Stephens, 462 U.S. 862 (1983), controlled the disposition of Petitioner's case. Even if the testimony of the psychiatrist was inadmissible, it related to the history and background of Petitioner and did not inject any misleading, inaccurate or arbitrary factor into Petitioner's sentencing hearing.

Petitioner's attorneys sought out psychiatric evidence in order to establish mitigation, and no evidence has been presented to establish that any such mitigation exists. Counsel's cross-examination of the psychiatrist was for the purpose of laying a foundation to argue to the jury that Petitioner could be helped by treatment.

The jury in Petitioner's case was adequately instructed that they had the power to sentence him to life even if they found the existence of aggravating circumstances. There exists no conflict between the Fourth Circuit's Opinion and other circuits on the question of instructions. This Court has previously rejected this same argument in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), cert. denied, 105 S.Ct. 1855 (1985).

ARGUMENT

I.

PETITIONER'S FIFTH AMENDMENT CLAIM IS BARRED FROM CONSIDERATION UNDER THIS COURT'S DECISION IN WAINWRIGHT V. SYKES, 433 U.S. 72 (1977).

Throughout the federal proceedings in this case, Respondent has consistently maintained that federal courts were barred from consideration Petitioner's Fifth Amendment claim. Respondent asserted this defense since this claim had not been considered by state courts due to a procedural default. Without ruling on the state's default argument, the Fourth Circuit found that Petitioner was not entitled to relief.

During pretrial preparation Petitioner was examined by Dr. Pile, a private psychiatrist. During this examination Petitioner volunteered that while driving a school bus he had assaulted a girl by tearing off her clothes. In the sentencing phase of Petitioner's trial, the Commonwealth called Dr. Pile to relate this bus incident. Petitioner's attorney objected to this testimony but was overruled by the trial judge. (A. 51-54).[2] Petitioner concedes that this issue was not raised on appeal in the Supreme Court of Virginia. (Petition, p. 9).[3]

In Wainwright v. Sykes, 433 U.S. 72 (1977), this Court established the doctrine that federal courts may not take cognizance of constitutional issues which could have been but which were not raised before the state trial court when the state procedural law requires that such matters be raised at trial in

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[2]References will be to the Appendix filed with the Petition and designated (A. _____), and to the Supplemental Appendix filed with this Brief In Opposition and designated (S.A. ____).

[3]Smith notes that this issue was raised and fully briefed by Amicus (Petition, p. 9). The Supreme Court of Virginia was unmistakable in its ruling that it would not consider any arguments by Amicus which had not been raised at trial and not addressed by Smith on appeal. Smith v. Commonwealth, 219 Va. 455, 460, 248 S.E.2d 135, 139 n. 1 (1978). An Amicus cannot expand the issues or arguments raisnd by the parties. United Parcel Service v. Mitchell, 451 U.S. 56, 60 n. 2 (1981); Bell v. Wolfish, 441 U.S. 520, 531 n. 13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960).

order for them to be considered on appeal. This doctrine arose from the Court's concern for comity, federalism and the orderly administration of justice. This Court was of the opinion that the trial itself should be the main event, and federal courts should not be reviewing issues years after the trial when a defendant failed to follow the state's procedural rules.[4]

Virginia has a procedural rule as contemplated in Sykes. Rule 5:21 (now 5:17 and 5:25), Rules of the Supreme Court of Virginia, provided in part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. [Emphasis added].

When a state like Virginia, refuses to review an alleged constitutional error because a defendant has failed to comply with a state procedural rule, then federal courts may not adjudicate such constitutional claim unless there was justifiable cause for the default and actual prejudice resulting from the default. 433 U.S. at 87. The burden of proof for the cause and prejudice prongs of Sykes rests upon the Petitioner.

During the state habeas hearing Petitioner's counsel was asked why the now asserted claim of self-incrimination was not raised on appeal in the Virginia Supreme Court. He responded by saying:

> We had the various objections that we were going to raise to the Supreme Court of Virginia, sort of underlined each objection that we made during the course of the trial, thinking to make that an appealable point, and we didn't find -- we didn't think at that time there was any merit to that particular claim.

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[4]The Fourth Circuit has held that the Sykes doctrine is applicable when the state's procedural rule requires an issue to be specifically raised on appeal before it can be considered. Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980). Accord Norris v. Wainwright, 588 F.2d 130 (5th Cir. 1979).

(S.A. 1).

Mr. Pugh testified that while he did not personally research any federal law relating to this issue, research was conducted which might have included federal case law. (S.A. 2-3). The results of the research were discussed among counsel, and a decision was made not to raise this issue on appeal. (S.A. 2-3). This process of examining the record to select the most promising issues for review is exactly what this Court has held appellate counsel is expected to do. Jones v. Barnes, 463 U.S. 745 (1983).

This case was tried in November, 1977, and counsel was aware of controlling state authority that Dr. Pile's testimony was admissible. See Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975). Counsel felt that the issue would not be successful. (S.A. 3). This Court has held that "[s]ince the cause and prejudice standard is more demanding than Fay's deliberate bypass requirement...we are confident that perceived futility alone cannot constitute cause." Engle v. Isaac, 456 U.S. 107, 130 n. 36 (1982).

Counsel cannot be considered ineffective for not raising this claim on appeal. In its decision in this case the Fourth Circuit noted that "[a]t the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November, 1977, was not certain." (A. 5). Both the Fifth and Eleventh Circuits have held that failure of counsel to anticipate Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), and timely enter an objection to similar testimony did not constitute ineffective assistance of counsel. Gray v. Lucas, 677 F.2d 1086, 1096 n. 9 (5th Cir. 1982), cert. denied, 103 S.Ct. 3099 (1983); Alvord v. Wainwright, 725 F.2d 1282, cert. denied, 105 S.Ct. 355 (1984).

Petitioner's counsel raised 17 issues on direct appeal, and deliberately chose to omit Petitioner's Fifth Amendment claim while pursuing other avenues of defense. "[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize

and raise every conceivable constitutional claim." Engle v. Isaac, 456 U.S. 107, 134 (1982).

Petitioner suggests that the Fourth Circuit in choosing to address the merits of this claim, implicitly ruled that Petitioner had demonstrated sufficient "cause" and "prejudice" to satisfy the requirements of Sykes. (Petition, p. 15 n. 4). A reading of the Fourth Circuit's opinion does not support Petitioner's assertion. The Fourth Circuit simply chose not to reach the state's claim of procedural default since in the Fourth Circuit's opinion the Petitioner was not entitled to relief. (A. 4-6). The Fourth Circuit specifically noted that the question was very clouded as to whether the representation of trial counsel was, in fact, ineffective or that any prejudice resulted from not having raised this claim on appeal. (A. 7 n. 4). The Fourth Circuit also observed that "there is reason to doubt whether counsel for Smith could muster sufficient reason to constitute trial counsel's failure to object inexcusable neglect." (A. 5). See Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), cert. granted sub nom. Carrier v. Sielaff, 105 S.Ct. 3523 (1985). Such statements by the Fourth Circuit refute Petitioner's assertion that the court implicitly found sufficient "cause" and "prejudice" to satisfy Sykes.

For these reasons Petitioner has failed to establish "cause" for his default on the Fifth Amendment issue and is barred from having his claim adjudicated in the federal courts. The Fourth Circuit should have found that Petitioner's Fifth Amendment claim was barred by procedural default. Under the clear pronouncement in Wainwright v. Sykes, supra, this Court should not consider Petitioner's Fifth Amendment claim.

ARGUMENT

II.

PETITIONER'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED.

A. DR. PILE'S TESTIMONY WAS ADMISSIBLE AND DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The record establishes that after Petitioner had been examined by Dr. Palmaz and the Forensic Unit of Central State Hospital, his counsel made the decision to seek a psychiatric evaluation by Dr. Wendell Pile, a private psychiatrist. On more than one occasion counsel advised Petitioner not to discuss prior offenses with anyone. (S.A. 4). After Petitioner returned from Central State Hospital, and before the examination by Dr. Pile, counsel again advised Petitioner not to make any statements about past offenses. (S.A. 5-6). Counsel testified at the state habeas hearing that in view of the repeated advice he had given Petitioner about not discussing prior offenses with anyone, he believed Petitioner would heed his advice. (S.A. 6).

During the initial stages of the examination, Dr. Pile asked Petitioner if he had been involved in any prior sexual episodes. Petitioner advised Dr. Pile that his attorney had warned him not to discuss any incidents which were not related to the present offense. Thereafter, Dr. Pile made no request for such information. At a later time during the examination, Petitioner volunteered the information about the bus incident. (A. 68). On this evidence the state judge found:

> Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

(A. 68).[5]

In Estelle v. Smith, supra, this Court held that introduction of a court-appointed psychiatrist's testimony to

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[5]Although Petitioner was present at the state plenary hearing he chose not to testify. Therefore, the evidence stands uncontradicted.

prove a capital defendant's future dangerousness, based on information gleaned from a custodial examination of the accused who neither requested the examination nor introduced psychiatric evidence on the issue and who was not warned of his right to remain silent and that any statement he made could be used against him at sentencing, violated his Fifth Amendment rights. Smith is distinguishable from this case. The evidence is clear that, unlike Smith, Petitioner requested the examination by Dr. Pile. Further, Dr. Pile was a private psychiatrist who was selected by Petitioner.[6]

Under circumstances strikingly similar to those present in this case, the court in Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), held that no Fifth Amendment claim existed. In that case the defendant took the stand in his own defense and testified that he was home sleeping off a drunk at the time of the murder. The state called Dr. Niswonger, a psychiatrist who had examined the defendant before trial. Dr. Niswonger testified that during the examination the defendant claimed amnesia concerning the events of the murder. The state then argued to the jury that this testimony contradicted the defendant's alibi that he was home during the murder. The defendant contended that under Estelle v. Smith, Dr. Niswonger's testimony was inadmissible. In rejecting this argument the Eleventh Circuit stated:

> The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in Estelle v. Smith. On the contrary, Smith retained Niswonger (through his trial counsel) to conduct an examination regarding a possible claim of insanity. In such a case, Estelle v. Smith does not require that the psychiatrist give Miranda warnings. The protections of Estelle do not apply unless the psychiatrist is "essentially...an agent of the State...." 451 U.S. at 467.

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[6]Petitioner was the moving party for this examination, but since he was indigent, the trial court entered an order to allow payment to Dr. Pile. Such a circumstance cannot be construed to change this private psychiatric examination into a court-ordered examination referred to in Estelle v. Smith.

741 F.2d at 1258, 1259.

Furthermore, in Estelle v. Smith, this Court reaffirmed that "[v]olunteered statements...are not barred by the Fifth Amendment." 451 U.S. at 469. The state court has found upon the evidence that Petitioner had been carefully advised by his attorney not to discuss with anyone any prior offenses, and that Petitioner clearly understood this warning. (A. 68). Notwithstanding his attorney's advice, Petitioner voluntarily told Dr. Pile about the bus incident. (A. 68).

Under the facts of this case, Petitioner's revelation about the bus incident was given freely and voluntarily without any compelling influence to a private psychiatrist who was not an agent of the state.[7] Under such circumstances Dr. Pile's testimony was admissible and Petitioner's Fifth Amendment rights were not violated.[8]

B. THE FOURTH CIRCUIT CORRECTLY APPLIED ZANT V. STEPHENS, 462 U.S. 862 (1983).

Petitioner asserts that the Fourth Circuit has given too broad a reading to this Court's decision in Zant v. Stephens. In the present case the jury found both the "dangerousness" and "vileness" aggravating circumstances. Petitioner does not challenge the jury's finding of the "vileness" aggravating circumstance. (A. 8), but contends that the admission of Dr. Pile's testimony on the "dangerousness" circumstance precluded the Fourth Circuit from applying Zant.

In Zant the jury having found three separate and distinct aggravating factors sentenced the defendant to death. While the case was on direct appeal the Supreme Court of Georgia held that

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[7]There exists no physician-patient privilege in a criminal prosecution in Virginia. See Gibson v. Commonwealth, supra.

[8]Throughout the Petition the Petitioner seeks to insert a Sixth Amendment claim. (Petition, p. 11-12, 16 n. 5, 24-25, 27-31). These Sixth Amendment arguments were raised for the first time on appeal in the Fourth Circuit and are not properly before the Court.

the aggravating circumstance "a substantial history of serious assaultive criminal convictions" was invalid as being unconstitutionally vague. The Georgia Supreme Court nevertheless concluded that the two other aggravating circumstances adequately supported Zant's sentence of death.

The major focus of this Court in Zant was an examination of the reason the aggravating circumstance had been found to be invalid by the Georgia Supreme Court. This Court found that the aggravating circumstance had not been found invalid for some impermissible reason, such as, treating constitutionally protected conduct as an aggravating circumstance; and concluded that the death sentence need not be set aside as long as at least one valid aggravating circumstance remained.

This was the ruling of the Fourth Circuit in the present case. The Fourth Circuit noted that "[t]he jury found separately, with respect to each aggravating circumstance, that it alone merited imposition of the death penalty," (A. 3), and that "[t]he testimony in the guilt phase of the case amply provided a basis for decision that the crime was vile." (A. 8). Because of this posture of the case, the Fourth Circuit deemed it unnecessary to examine Petitioner's claim relating to the statement concerning an earlier attack Petitioner described during a private psychiatric interview.

Petitioner argues that such a disposition was incorrect. The thrust of his argument is that the state introduced inadmissible evidence at the sentencing phase through the testimony of Dr. Pile.[9] For the reasons presented in Argument II A, supra, Petitioner is incorrect in his conclusion that Dr. Pile's testimony was inadmissible. For this reason Petitioner's argument fails since it is based upon a false premise, and the Fourth Circuit correctly applied Zant.

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[9]Petitioner's assertion that the Fourth Circuit assumed Dr. Pile's testimony was in fact inadmissible (Petition, p. 16), is not supported by the record. The Fourth Circuit's opinion is silent on this question.

In Zant this Court noted that when responding to the Court's certified question the Georgia Supreme Court stated, "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." Zant, 103 S.Ct. at 2750. (Emphasis added). This observation by this Court is of no benefit to Petitioner for several reasons. This Court in Zant reserved for another day the question of whether a death sentence would be impaired if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information. Zant, 103 S.Ct. at 2748 n. 24. The testimony in this case concerning an earlier attack by Petitioner was neither misleading nor inaccurate.[10] Although this testimony was adduced at the sentencing hearing, where it could have been denied or explained by Petitioner, see Zant, 103 S.Ct. at 2748, it has never been denied nor shown to be inaccurate.

Furthermore, the "dangerousness" aggravating circumstance would not fail even if the testimony relating the earlier attack were to be discarded. The jury had before it evidence that Petitioner had previously been convicted of rape in 1973, and committed this vicious rape and murder not quite four months after his release from serving his sentence for the prior rape. The jury also had before it Petitioner's confession which contained his statement that he killed Mrs. Weiler because "[a]ll I could think about was going back to the penitentiary. I was afraid she could send me back." (S.A. 7). The jury was entitled to infer that Petitioner would kill again whenever necessary to avoid being returned to the penitentiary. It takes an unreasonable view of the evidence to conclude that the jury would not have found the "dangerousness" aggravating circumstance but for the presence of the testimony about the earlier attack. This is especially so in view of the fact that the earlier attack had

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[10]The fact that the contested evidence was neither misleading nor inaccurate disposes of Smith's reliance upon Gardner v. Florida, 430 U.S. 349 (1979). (Petition, p. 17).

occurred some 15 years prior to the murder of Mrs. Weiler and when Petitioner was about 15 years of age.

Other courts when confronted with the claim that a death sentence should be set aside when inadmissible[11] evidence has been admitted during sentencing have concluded that such fact alone is insufficient to warrant such action. The defendant in State v. Campbell, 664 S.W.2d 281 (Tenn. 1984), was sentenced to death upon conviction of murder during a robbery. The jury found three aggravating circumstances, one being that the defendant had been previously convicted of one or more felonies other than the present charge which involved the use or threat of violence to the person. During the appeal the Tennessee Supreme Court found that the State's introduction of convictions for grand larceny and burglary were inadmissible as they were not related to the use or threat of violence to the person. Nevertheless, the Court found the remaining evidence sufficient to support the aggravating circumstance. The court was convinced beyond a reasonable doubt that the admission of this evidence was harmless. Further, the court found the evidence of the other aggravating circumstances overwhelming and in no way dependent on proof of the convictions of the non-violent felonies.

Skillern v. Estelle, 720 F.2d 839 (5th Cir.), cert. denied, ____U.S.____, 105 S.Ct. 224 (1983), presents an analogous situation. During the sentencing phase the state introduced evidence from a forensic pathologist that there was a probability that the defendant would commit acts of violence that would constitute a continuing threat to society. The Texas Court of Criminal Appeals had found this evidence to have been inadmissible because the doctor was incompetent to testify as an expert and lacked firsthand familiarity with the defendant's personality to testify as a lay witness. Nevertheless, the Texas court found the admission of this evidence was harmless due to

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[11]The Respondent has set forth the reasons that the testimony of Dr. Pile was admissible but will assume only for the sake of argument that the contested evidence was inadmissible.

the other evidence of Skillern's violent propensities adduced by the prosecution. The Fifth Circuit concluded that federal habeas relief was not justified since the admission of the prejudicial testimony was not "material in the sense of a crucial, critical, highly significant factor." 720 F.2d at 852.

Contrary to Petitioner's assertion (Petition, p. 22), the affirmance in this case will not allow prosecutors to introduce any and every kind of evidence at sentencing. Introduction of evidence which misleads the jury or injects an arbitrary factor into the sentencing phase can still be dealt with. See Zant, 103 S.Ct. at 2748 n. 23. An example of the application of this principle is found in Evans v. Commonwealth, 228 Va. 468, 323 S.E.2d 114 (1984). Evans had been convicted of capital murder and sentenced to death. His conviction and sentence had been affirmed by the Virginia Supreme Court and certiorari had been denied by this Court. During the proceedings on state habeas corpus it became apparent that many of the records of convictions presented to the jury had been seriously misleading or otherwise defective. The Commonwealth confessed error and acknowledged that Evans' death sentence should be vacated.

The testimony of Dr. Pile concerning Petitioner's admission of an earlier attack was not inherently inadmissible. The background of a defendant is a legitimate area of focus in capital cases. Such evidence did not inject any arbitrary factor into this case such as race, religion, political affiliation, or expressions protected under the First Amendment which were the expressed concerns of this Court in Zant.

The facts in the present case establish that the Commonwealth did not inject into the sentencing phase of Petitioner's trial any misleading or inaccurate information, nor any arbitrary factor which would have impacted upon the sentence of death. Furthermore, the "dangerousness" aggravating circumstance remains sufficient even if the objected to evidence is removed. For these reasons, the Fourth Circuit properly applied Zant to this case.

C. THE TESTIMONY OF DR. PILE WAS INSIGNIFICANT AND DID NOT INFLUENCE THE JURY'S DECISION TO IMPOSE THE DEATH SENTENCE.

Petitioner maintains that Dr. Pile's testimony was demonstrably prejudicial, but fails to compare it to the remaining evidence which was before the jury on the issue of "dangerousness." When viewed in relation to the other unchallenged evidence introduced by the Commonwealth to establish the "dangerousness" aggravating circumstance, Dr. Pile's testimony concerning the bus incident pales into insignificance.

The Commonwealth introduced evidence that Petitioner had previously been convicted of rape in 1973. Further, the evidence established that Petitioner had been released from the penitentiary and placed on parole from this prior rape conviction on January 25, 1977, not quite four months before he raped and murdered Mrs. Weiler. The jury also had before it Petitioner's confession which contained his statement that he killed Mrs. Weiler because "[a]ll I could think about was going back to the penitentiary. I was afraid she could send me back." (S.A. 7).

Although the prosecutor mentioned the bus incident during argument to the jury, it was hardly the focus of the Commonwealth's case. There were three passing references to this incident in fourteen pages of argument.

The jury also had before it the heinous nature of the offense itself.[12] Under Virginia law the "dangerousness" aggravating circumstance can be proven by reference to the circumstances surrounding the commission of the offense. See § 19.2-264.4C, Code of Virginia. In Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 127 (1982), cert. denied, 460 U.S. ___ (1983), the Court said:

> As to the factor that defendant will pose a continuing serious threat to society, we need only refer again to the heinous

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[12]The jury was instructed to consider the circumstances surrounding the offense when determining the punishment to be imposed. (A. 64).

> circumstances surrounding this homicide, committed upon a 72-year-old woman during the course of robbery. The jury and trial court could properly conclude that if defendant has killed once under these circumstances for the mere purpose of obtaining a sum of money, he is likely to kill again, whether incarcerated or not, for an equally devious purpose.

224 Va. at 151.

This Court has recognized that the admission into evidence of a defendant's confession in violation of the Fifth Amendment can be harmless. In Milton v. Wainwright, 407 U.S. 371 (1972), the Court held that assuming arguendo an involuntary confession was improperly admitted into evidence, such admission was harmless beyond a reasonable doubt when the jury had before it overwhelming evidence of the defendant's guilt. In so holding, the Court made a cogent observation:

> The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

407 U.S. at 377, 378.

Likewise, in Brown v. United States, 411 U.S. 223 (1973), the Court found that the erroneous admission of a co-defendant's extrajudicial confession implicating the defendant in violation of Bruton v. United States, 391 U.S. 123 (1968), was harmless. The Court, upon an independent examination of the record, concluded that the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury.

When examining the present case in light of the opinions of this Court in Milton and Brown, it becomes clear that Dr. Pile's testimony was merely cumulative of the other overwhelming uncontroverted evidence properly before the jury. In view of the

overwhelming evidence of "dangerousness" it is unrealistic to believe the jury in this case would not have found the "dangerousness" aggravating circumstance in the absence of the testimony of Dr. Pile concerning the bus incident.

For this additional reason Petitioner suffered no prejudice by the admission of Dr. Pile's testimony concerning the bus incident.[13]

ARGUMENT

III.

PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE OF HIS TRIAL.

This Court rendered a landmark decision in Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984), concerning claims of ineffective assistance of counsel. 104 S.Ct. at 2064. In reviewing claims of ineffective assistance of counsel this Court noted that it was not necessary to address both counsel's performance and prejudice if the petitioner makes an insufficient showing on one. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 104 S.Ct. 2069, 2070. Indeed, this Court suggested that it was not only proper, but usually preferable, to dispose of an ineffectiveness claim under the prejudice prong without even reaching the issue of whether counsel's performance was deficient. Id.

A review of the Petition concerning Petitioner's claim of ineffective assistance of counsel (Petition, p. 33-46) establishes that his claim mainly concerns counsel's performance as it relates to the testimony of Dr. Pile. As previously

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[13]Petitioner claims it is noteworthy that neither the state habeas judge nor the federal magistrate found that Dr. Pile's testimony was not prejudicial. (Petition, p. 32 n. 15). Both the state habeas judge and the federal magistrate held that Petitioner was barred by procedural default from pressing any attack upon Dr. Pile's testimony. Under such a circumstance there was no occasion for either to rule on the prejudice issue.

observed, Dr. Pile's testimony bore only on the question of the "dangerousness" aggravating circumstance. As noted, the "vileness" aggravating circumstance is sufficient in itself to sustain Petitioner's sentence of death, and Petitioner cannot carry his burden of establishing prejudice from any alleged deficiency in counsel's performance. Accordingly, this Court need go no further in reviewing Petitioner's claim of ineffective assistance of counsel.

A. COUNSEL DID NOT FAIL TO PROTECT PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The record establishes that Petitioner's counsel made the decision to seek a psychiatric evaluation by Dr. Pile. Since counsel was aware of the holding in Gibson v. Commonwealth, supra, (S.A. 8), he advised Petitioner on more than one occasion not to discuss prior offenses with anyone. After Petitioner returned from Central State Hospital, counsel again advised him not to make any statements about past offenses.

Counsel is taken to task for not giving Petitioner careful and explicit advice immediately before his examination with Dr. Pile, and not accompanying him to the examination. (Petition, p. 34,35). Counsel testified at the state habeas hearing that in view of the repeated advice he had given Petitioner about not discussing prior offenses with anyone, he believed Petitioner would heed the advice. (S.A. 6). The fact of the matter is that Petitioner did understand this advice from his attorneys. For when Dr. Pile asked Petitioner about prior episodes, Petitioner told Dr. Pile that his attorneys had warned him not to discuss instances which were not related to the present crime. (A. 60). This evidences a clear understanding by Petitioner of the explicit warning given him by his attorneys. There does not appear to be any constitutional right to have counsel actually present during the examination. Estelle v. Smith, 451 U.S. at 470 n. 14, therefore, it is difficult to perceive of what benefit would have been gained by counsel accompanying Petitioner to Dr.

Pile's office.

After Petitioner told Dr. Pile that his attorneys had warned him not to discuss any prior offenses, Dr. Pile did not thereafter press or request any such information. (A. 68). At a later time during the examination, Petitioner voluntarily told Dr. Pile about the bus incident. (A. 68). Counsel exercised reasonable care in advising Petitioner not to discuss prior offenses. With full knowledge of this advice, Petitioner chose to ignore it. Counsel cannot be faulted when a client chooses not to heed his advice.

Additionally, Petitioner asserts that counsel was ineffective in not appreciating the conflict between his advice to Petitioner to remain silent and his efforts to explore possible psychiatric defenses. There appears to exist a conflict within the psychiatric community about the ability of a psychiatrist to make a diagnosis if a defendant declines to discuss his recollection about the circumstances before, during and after the offense. Dr. Dimitris testified that 95% of the defendants he examines either say they don't remember the events or didn't commit the act. (S.A. 9,10). While admitting such information is helpful, it is not essential for diagnostic purposes or the forensic unit would have to be closed. (S.A. 11). Dr. Showalter testified that he could not give an informed opinion in such circumstances. Whatever the resolution of this controversy, it is of no moment. Petitioner, as in the case of prior incidents, chose to ignore the advice of his attorneys and did discuss with the psychiatrists the events surrounding the crime. Petitioner has waived his right to attack the guilt phase of his trial, therefore, the issue of his sanity at the time of the offense is not before the court. Since Petitioner did discuss the circumstances of the offense with the psychiatrists, they were able to have enough information upon which to base an expert opinion regarding mitigation. Regardless of the advice given by counsel, Petitioner has failed to establish actual prejudice.

B. COUNSEL WAS NOT INEFFECTIVE IN THE EXAMINATION OF DR. PILE.

The record establishes that after the prosecutor asked Dr. Pile about the bus incident, Petitioner's attorneys conferred. (S.A. 12). After this conference counsel asked Dr. Pile about his diagnosis. (S.A. 12). Counsel asked Dr. Pile over what period of time this antisocial personality develops, to which Dr. Pile responded "develops around the time of puberty." (S.A. 13). Counsel also developed from Dr. Pile that people, like Petitioner, could be helped in changing a personality, when Dr. Pile testified, "An attempt is made with psychiatric help and maximum security type prison or hospital, to see if something can be done." (S.A. 14). Counsel then developed this evidence into an impassioned plea to save Petitioner's life. Counsel argued,

> Well, this problem that Michael Smith has is not something that he could have helped. Mr. Person (the prosecutor) asked us well, who do we blame? He said, "I blame it on him." At three years of age, at three years of age, Mr. Person -- Mr. Person would have expected Michael Smith to say, "No, I don't want this illness. Take it away. Take it away. I don't want it." What caused this illness? I don't know.

(S.A. 15,16).

In argument counsel stressed that Petitioner's mental condition caused his behavior, and he could be treated:

> I'm asking you to give Michael Smith that opportunity to give Michael Smith the opportunity to have some treatment for this illness. We don't take someone out that has pneumonia or cancer and take him up to Spring Street in Richmond and strap him in a chair and throw thousands of volts to them. We treat them. True, they have not committed a crime. But their illness did not cause them to commit a crime either.
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> He can be helped, and all we ask you ladies and gentlemen is that you conserve human life, as I believe it is proper. That you conserve his life and allow him the opportunity to be treated for his illness, just as if a person with pneumonia can be treated for theirs.

(S.A. 17-19).

During the state habeas hearing Mr. Pugh testified that he

could not then recall why he asked for Dr. Pile's diagnosis, but did so after a discussion with co-counsel. (S.A. 20).[14]

A reading of counsel's argument makes it patently clear why Dr. Pile was asked for his diagnosis. The only reasonable defense for Petitioner was to attempt to convince the jury that he was suffering from an illness for which he was not responsible, and that such illness could be treated. Without such evidence, counsel could not have made this argument.

On this issue the state court found:

> While petitioner's counsel may have been uncertain at the evidentiary hearing why he questioned Dr. Pile as he did, I find that the trial transcript adequately explains the reasons behind his inquiries. During cross examination of Dr. Pile, petitioner's counsel inquired as to (1) whether sociopaths have compulsions to commit crimes, (2) the causes of the sociopathic personality, (3) the length of time it takes to develop such a condition, (4) whether the condition could be categorized as an emotional illness or sickness, and (5) whether such a condition can be treated. In addition, during his closing statement petitioner's counsel argued that petitioner was suffering from an illness that he could not help and asked the jury to give him the opportunity to obtain treatment, which the Court finds to be reasonable trial strategy in light of the confession of the petitioner and the overwhelmingly aggravating facts exhibited by testimony in the case.
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> * * * *
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> I find that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated. The necessity of placing petitioner's mental state in question, not counsel's incompetence, produced the prejudicial statements.
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> * * * *
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> Furthermore, Dr. Pile's testimony was not entirely prejudicial or void of strategic

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[14] It is to be noted that the state hearing occurred two years after trial, and further that Petitioner was represented by two attorneys, Mr. Pugh and Mr. Wood. Petitioner did not call Mr. Wood to testify at the state hearing, and has offered no explanation as to how Mr. Wood would have testified on this point. See Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983).

> value. On the crucial question of the likelihood of future criminal conduct, Dr. Pile's testimony that in certain cases a sociopathic personality can be treated actually weighed in petitioner's favor. I thus conclude that counsel's cross examination was the product of informed, professional deliberation, and thus competent under the standards discussed supra.

(A. 73-74).

Petitioner challenges these findings as being nothing more than speculation. What Petitioner overlooks, however, is that a habeas court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance: that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, ___ U.S.___, 104 S.Ct. at 2065, 2066. The fact that Petitioner's present counsel may have tried the case differently is not the issue. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. 104 S.Ct. at 2066. The record amply supports these findings and Petitioner has failed to overcome the presumption that all significant decisions were made in the exercise of reasonable professional judgment.

In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978), the court concluded that counsel was not ineffective when he introduced highly prejudicial information in order to establish the only available defense. The Eleventh Circuit refused to find counsel ineffective in his handling of the psychiatric evidence at the sentencing phase of his trial in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). While hindsight might show the attorney's performance was less than stellar, the court can not conclude that it fell below the standard of reasonably effective assistance.

Petitioner also contends that an adequately prepared defense attorney would have had no difficulty impeaching Dr. Pile's

testimony. This assumes, of course, that counsel wanted to discredit Dr. Pile's testimony. The converse is true, however, in that counsel wanted Dr. Pile's diagnosis in order to make the argument to the jury that Petitioner was suffering from a disease which could be treated.

Petitioner makes much of the fact that Dr. Showalter disagreed with Dr. Pile's diagnosis. Dr. Pile, who has been practicing psychiatry since 1946, had examined many persons to determine their sanity at the time of the offense. The fact that he usually testified for defendants led Petitioner's counsel to choose him. Dr. Pile testified that he felt he had sufficient information to render his opinion. Even though Dr. Showalter didn't believe he could have arrived at Dr. Pile's diagnosis based upon the evidence available, he would not commit himself that such a diagnosis couldn't be made. (S. A. 21-22).[15]

That there was some disagreement between the psychiatrists does no more than confirm what this Court found in Ake v. Oklahoma, ___U.S.___, 36 Cr.L. 3159 (1985):

> Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness.

___U.S.___ at, 36 Cr.L. at 3163.

Based upon this disagreement the state court found that "the expert opinion was equivocal and in basis disagreement." (A. 75), and that counsel was not ineffective for not attacking Dr. Pile's one-hour examination.[16]

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[15]It must be noted that Dr. Showalter has never examined Petitioner, and was not in a position to say whether or not he was a sociopath.

[16]Dr. Dimitris testified at trial that it's possible to make a diagnosis of sociopathy in an hour's examination. He even said it could be done in fifteen minutes if the right material came through.

Petitioner's argument about the predictability about future dangerousness has clearly been rejected in Barefoot v. Estelle, ___U.S.___, 72 L.Ed.2d 1090 (1983).

C. COUNSEL DID CONDUCT AN ADEQUATE INVESTIGATION FOR MITIGATION.

To claim that counsel did not conduct an adequate investigation for mitigation is simply to ignore the record. At the state habeas hearing Dr. Dimitris testified that Mr. Pugh "was very eager to know...[whether there] were any other extenuating circumstances that could be of help to him." (S.A. 23). Dr. Dimitris further testified that "Mr. Pugh showed special consideration in regard to what was the finding. He was not satisfied with the basics. He wanted to go into another facet of his life." (S.A. 24). Dr. Dimitris continued by saying Mr. Pugh wanted to know if there was "any mitigation whatsoever." (S.A. 25).

Petitioner places his entire focus upon the fact that his counsel did not point out to the examining psychiatrists the statutory mental mitigating abnormalities found in § 19.2-264.4, Code of Virginia. Such a position, however, does no more than attempt to exhault form over substance.

During the state habeas hearing, both Drs. Dimitris and Pile testified unequivocally that their respective examinations were sufficiently broad enough to allow them to have formed an opinion on the statutory mitigating factors, and that they did not find either statutory factor.[17] Upon this evidence the state court found:

> The mitigating mental factors to be considered under the statute revolve around petitioner's mental state at the time of the offense, a question on which both examinations focused. On this

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[17]While Dr. Showalter testified that he could not render an opinion on the statutory mitigating factors after an hour's examination, he was unwilling to say that others could not do so. This is nothing more than the familiar disagreement among professionals.

> point, both examining doctors testified that their examinations were sufficient to render an opinion concerning the statutory mitigating mental conditions. I thus find that petitioner was adequately examined with regard to the statutory defense.
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> In addition, in light of the testimonies of the examining psychiatrists that no evidence was found to support a defense of mitigating mental conditions, I find that petitioner suffered no prejudice from counsel's failure to direct the psychiatric examinations toward these issues.

(A. 76,77).

The district court not only found these findings adequately supported by the record, but concluded:

> [N]o proof was offered at the state hearing (even though petitioner's expert psychiatric witness testified at length) nor is it now asserted that an examination conducted by a psychiatrist different from Drs. Pile and Dimitris would develop testimony concerning mitigating mental conditions not found by the psychiatrists who in fact examined petitioner.

(S.A. 26).

The Fourth Circuit has also found that counsel were not ineffective for not specifically directing the psychiatrists to the statutory mitigating factors. (A. 9).

It follows that if counsel failed to perform properly by not specifically pointing out the statutory mitigating factors, Petitioner has failed to establish the necessary predicate of prejudice.

ARGUMENT

IV.

THE JURY INSTRUCTIONS AT THE SENTENCING PHASE WERE CONSTITUTIONALLY SUFFICIENT.

Petitioner's argument with respect to instructions at the

penalty phase is that they established a presumption in favor of the death penalty.[18]

At the sentencing phase the trial court gave two instructions along with the verdict forms. Instruction 1 charged "that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt [one of the aggravating circumstances]. (A. 63) (Emphasis added). This was immediately followed by "you may fix his punishment at death." This instruction then concluded by telling the jury that if it found "that the Commonwealth has failed to prove either [aggravating circumstance] beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment." (A. 63) (Emphasis added).

The trial court also gave Instruction A which told the jury "that when determining the punishment to be imposed...you shall consider...any other facts in mitigation of the offense." This instruction went on to set out the two mental mitigating abnormalities and Petitioner's age as nonexclusive factors to be considered.

These instructions not only mandated that the jury consider mitigating circumstances, but told the jury twice that they were free to impose a life sentence even if they found one of the aggravating factors, or if they found that mitigating circumstances did not justify a sentence of death. The trial court further instructed the jury that they may impose death even if they found an aggravating circumstance. (S.A. 27-31).

Taken as a whole, the instructions leave no doubt that the jury was free to recommend a sentence of life. Courts must

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[18]Petitioner's entire argument on direct appeal was contained in one paragraph, and he only argued that Instruction 1 emphasized the aggravating circumstances. There was no argument concerning his present claims that the instruction unduly restricted the jury's prerogative to return a life sentence or failed to give the jury adequate guidance regarding the circumstances under which it was permitted to return a life sentence. These latter arguments are not properly before this Court as a result of procedural default.

resist the temptation to read jury instructions myopically. In Henderson v. Kibbe, 431 U.S. 145, 154 (1977), this Court stated, "the burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." When a petitioner bases a collateral attack upon an allegedly erroneous instruction, the burden is upon him to demonstrate that the alleged error, by itself, "...so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

Petitioner contends that this Court should grant a writ of certiorari to resolve an alleged conflict among the circuit courts of appeal concerning whether jury instructions which define the nature and function of mitigating circumstances are constitutionally required. He contends that the decision of the Fourth Circuit in this case is in direct conflict with decisions of the Fifth and Eleventh Circuits. See e.g., Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, 458 U.S. 1111 (1982); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984).[19]

This Court has just recently rejected this very argument in Briley v. Bass, 750 F.2d 1238, (4th Cir. 1984), cert. denied, ___ U.S.___, 105 S.Ct. 1855 (1985). There would appear to be no principled reason to grant certiorari in this case on this issue.

The line of cases upon which Petitioner relies stems from Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). In that case, however, the Court recognized that "[i]n some instances, it will be possible for the judge clearly to instruct the jury so as to guide and focus its consideration of the particularized circumstances of the individual offense and the individual offender without explicitly defining the nature and function of

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[19]Smith's reliance upon Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), and other Fifth and Eleventh Circuit Cases is inappropriate. No such arguments were presented to the Supreme Court of Virginia, and are procedurally barred.

mitigating circumstances...." 661 F.2d at 471 (emphasis added, footnote omitted). As an example of such an instance, the Court cited Jurek v. Texas, 428 U.S. 262 (1976). The Court in Spivey acknowledged that this Court had upheld the sentencing procedure in Jurek, even though under Texas law the jury was given no explicit instructions concerning mitigating circumstances. The Court did so because the Texas procedure, by requiring the jury to determine, among other things, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" necessarily focused the jury's consideration on whatever mitigating evidence the defendant was able to present. Spivey, 661 F.2d at 471 n. 10. This Court's decision in Jurek was premised upon assurances by the Texas Court of Criminal Appeals that the so-called "future dangerousness" factor would be construed "...so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show...." Jurek, 428 U.S. at 272.

Given the fact that Spivey recognized that an instruction defining the nature and function of mitigating circumstances is not constitutionally required in a situation such as that involved in Jurek, there is no logical reason to conclude that such an instruction was constitutionally required in Petitioner's case. As was the case in Jurek, the jury in Petitioner's case was required to determine the "future dangerousness" issue.

In terms of the jury's consideration being sufficiently focused upon mitigating circumstances in the absence of an explicit instruction defining the concept of mitigation, Petitioner's case cannot be distinguished from Jurek in any meaningful way. Thus, by Spivey's own terms, no instruction defining the nature and function of mitigating circumstances was constitutionally required in this case.

CONCLUSION

Each of the arguments asserted by Petitioner has been carefully considered and rejected by the district court and the Fourth Circuit. It is significant that not a single judge of the Fourth Circuit was impressed by Petitioner's argument. The Fourth Circuit has decided the issues in this case in keeping with precedent not only of this Court but with other circuit courts.

There do not exist any special reasons or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision. For these reasons the Petition should be denied.

Respectfully submitted,

WILLIAM G. BROADDUS
Attorney General of Virginia

James E. Kulp

JAMES E. KULP
Senior Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Counsel for Respondent
Allyn R. Sielaff, Director
Virginia Department of Corrections

Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,
Respondent.

JOINT APPENDIX

J. LLOYD SNOOK, III
(Appointed by this Court)
230 Court Square
Charlottesville,
Virginia 22901
(804) 293-8185

Counsel for Petitioner

WILLIAM G. BROADDUS
Attorney General of Virginia
JAMES E. KULP
(Counsel of Record)
Senior Assistant
Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6565

Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 24, 1985
CERTIORARI GRANTED OCTOBER 21, 1985

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RELEVANT DOCKET ENTRIES

Proceedings		
1982		
June 30	1	Order filing complaint in forma pauperis; substituting respondent; and directing the respondent answer within 23 days, entered June 28, 1982.
June 30	2	Motion for leave to proceed in forma pauperis.
June 30	3	Affidavit in support of motion for leave to proceed in forma pauperis.
June 30	4	Petition for stay.
June 30	5	Petition for writ of habeas corpus.
June 30	6	Order lodging petition and directing petitioner to submit fp certification within 20 days, JTT, U.S. Mag.
July 12	7	Motion for appointment of counsel on behalf of petitioner.
July 28	—	Answer *lodged*.
1984		
Mar. 7	8	Magistrate's preliminary report, entered and filed Mar. 6, 1984. JTT, Mag.
Mar. 6	9	Answer.
April 2	10	Magistrate's second preliminary report, entered and filed Mar. 30, 1984, JTT, U.S. Mag.
April 9	11	Magistrate's third preliminary report, entered Apr. 6, 1984 and filed Apr. 9, 1984. JTT, U.S. Mag.
June 21	12	Memorandum of law on behalf of plaintiff.
July 18	13	Memorandum of law on behalf of respondent.
Sept. 4	14	Magistrate's Report and Recommendation, entered and filed Aug. 31, 1984. JTT, U.S. Mag.

RELEVANT DOCKET ENTRIES

Proceedings		
Aug. 31	15	Memorandum of law on behalf of plaintiff.
Aug. 31	16	Memorandum of law on behalf of respondent.
Sept. 17	17	Exceptions to Magistrate's report on behalf of petitioner.
Dec. 4	18	Order denying and dismissing petition and entering judgment in favor of respondent; noting appeal procedures and declining to issue a certificate of probable cause for appeal.
Dec. 4	19	Judgment dismissing petition entered by the Clerk Dec. 4, 1984.
Jan. 3	20	Notice of appeal on behalf of petitioner.

VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

COMMONWEALTH

v.

MICHAEL MARNELL SMITH

ORDER

Now comes the defendant, by counsel, and moves the Court that Dr. Wendell J. Pile, a physician being skilled in the diagnosis of insanity, be allowed to examine the Defendant, MICHAEL MARNELL SMITH, and make a written report to the Court, the Attorney for the Commonwealth and the attorney for the defendant as to his opinion of the mental condition of the defendant at the time of the alleged offense and his mental condition at the time of examination.

It is therefore ordered that Dr. Wendell Pile make a examination of MICHAEL MARNELL SMITH within the next 10 days and report to the Court, Attorney for the Commonwealth and the attorney for the defendant in writing within 15 days his opinion of the mental condition of the said MICHAEL MARNELL SMITH at the time of the alleged offenses and his mental condition at the time of examination.

It is further ORDERED that the appointed physician shall be compensated pursuant to Section 19.2-175 of the Code of Virginia, as amended.

The aforesaid examination may be made at the Williamsburg City Jail or at the office of the above named physician and the Sheriff of the Williamsburg City Jail is hereby authorized and directed to make arrangements for any necessary transportation of the accused to and from the physician's office.

ENTER THIS 28th DAY OF SEPTEMBER, 1977.

/s/ _____
JUDGE

I ask this:

/s/ David F. Pugh, p.d.
DAVID F. PUGH
STONE, BLAND AND WOOD
Drawer H B
Williamsburg, Virginia 23185

SEEN:

/s/ W. L. Person, Jr.
W. L. PERSON, JR.
Commonwealth Attorney

**CIRCUIT COURT OF WILLIAMSBURG
AND COUNTY OF JAMES CITY**

**Testimony of Dr. Wendell Pile
November 3, 1977**

[928] DOCTOR WENDELL PILE, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q. Will you state your name and occupation and profession, please?

A. Doctor Wendell Pile; I'm a psychiatrist at Hampton, Virginia.

Q. And how long have you been a psychiatrist, Doctor Pile?

A. I have been a psychiatrist since 1976—1946.

Q. Could you briefly tell the ladies and gentlemen of the jury your background in regard to education?

A. I'm a graduate of the University Illinois Medical School in 1945, received my psychiatric training at Perry Point University Hospital, Eastern State Hospital, in Virginia, and received my boards in psychiatry in 1952; been in private practice of psychiatry since 1952, and past Director of the Mental Hygiene Clinic in Newport News. Now Medical Director of Bayberry Psychiatric [929] Hospital.

Q. Now, pursuant to an order of this Court, did you conduct an examination of the Defendant, Michael Marnell Smith?

A. I did.

Q. Is he in the Courtroom?

A. He is.

Q. Will you point him out to the ladies and gentlemen of the jury?

A. The gentleman to my left, over there (indicating).

COURT: Let the record show he pointed to the Defendant.

BY MR. PERSON:

Q. Did you talk to him in Hampton, Virginia?

A. I did.

Q. Do you remember what date you talked to him?

A. It was October the 1st.

Q. Did he tell you anything about the girl on the school bus?

A. He did.

Q. What did he say about that?

[930] A. He said —

MR. PUGH: Your Honor, I have a motion, if your Honor please, with respect to the—what further testimony the Doctor is going to—

COURT: All right. Take the jury out.

(At this time, ~~the~~ jury retired to the jury room.)

COURT: All right, sir.

MR. PUGH: Your Honor, we're going to object to any testimony made by Doctor Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged.

COURT: Well, Mr. Pugh—

MR. PUGH: As well as the fact that—I think that the Commonwealth has to lay the foundation as to what the Doctor instructed [931] Mr. Smith with respect to his rights to say anything to him.

COURT: I don't think the Doctor is an officer of the law; and certainly let me point out, first of all, Mr. Pugh, Doctor Pile was appointed at your suggestion to examine this man. You suggested Doctor Pile, as I recall it. Following your suggestion, I appointed him to examine this man.

MR. PUGH: That's not the question in issue.

COURT: If you will let me finish, Mr. Pugh, and I'll let you finish.

You, having done this, and Mr. Smith having talked to him, I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police [932] officer does under the Miranda.

Secondly, as I interpret Section 19.2-22-64.4, it clearly reads "evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant."

Now, how—how is history and background obtained? The man writes his own history. Sometimes with his words and sometimes with his deeds, but he writes his own history. And whatever he says, whatever he says he did, that's one of the ways of knowing history. Certainly—I think what he said to Doctor Pile is admissible.

What else do you want to say?

MR. PUGH: I don't have any further statement or [933] comment on that. I just object.

COURT: Note—

MR. WOOD: I do have one brief matter in regards to another matter.

COURT: All right.

MR. WOOD: The Doctor—has written a letter, as the Court knows, to the Court, of course, we got copies of it.

COURT: Yes sir.

MR. WOOD: And a comment was made in his letter in regards to any other previous rapes, and the comment that was made in his letter was that his lawyers had told him not to comment on anything like that.

MR. PERSON:—I'm not going to—

MR. WOOD: Or words to that effect. I don't believe it would be proper for the Doctor to say that.

[934] MR. PERSON: I'm not going to ask him that question.

COURT: I agree with you, Mr. Wood.

Any reference to what lawyers may have—what he said with reference to what lawyers may have told him, Doctor Pile, would not be proper to tell to the jury.

MR. WOOD: Yes sir.

COURT: Your exception will be noted, Mr. Pugh.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

BY MR. PERSON:

Q. Tell us what he told you, Doctor Pile.

A. He explained that he was driving [935] a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.

MR. PERSON: That's all the questions I have.

COURT: All right. You may cross examine him, Mr. Pugh.

CROSS EXAMINATION

BY MR. PUGH:

Q. Doctor Pile, you indicated—you stated that you saw Michael Smith on October the 1st, is that correct?

A. Right.

Q. And how long a period of time did you converse with Michael Smith?

A. I imagine about an hour. Usually my consultation is an hour.

Q. Did you see him after that date?

A. I did not.

MR. PUGH: Just a moment.

(At this time, [936] Mr. Pugh and Mr. Wood conferred.)

MR. GROSS (JUROR): When this incident that he described to the Doctor take place?

COURT: Did he advise you, Doctor, when it had taken place?

A. While he was driving a school bus. I assume it was at a younger age, but I don't know the exact time.

BY MR. PUGH:

Q. Doctor Pile, in your diagnosis, what was your diagnosis of Michael Smith?

A. I felt he was a sociopathic personality, sexual deviation, rape.

Q. What is that?

A. A person who—is also described as an antisocial personality. They're all sort of the same type of—of personality disorder. The basically people who are unsocialized, and they're quire repeatedly in conflict with the Court. They don't seem to have any capability of—of having loyalty to anybody, to any group or to any social values. Usually, they're rather irrespon[937]sible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards what's right and what's wrong.

Q. Do they have compulsions to commit crimes, Doctor?

A. They will commit crimes, but it need not be a compulsion. They just have no—they want to do what they want to do, irrespective of what the laws of the land are. Basically, they do what they will do to get—enjoyment.

Q. Over what period of time, if a person has this antisocial personality, what period of time would be a person develop this behavior? Is it a year or two years or—

A. No, frequently you see this start when they're in adolescence, and—it's something that—develops around the time of puberty, usually, but you can see it come out at other times.

Q. Would you categorize this as being an—an emotional illness or sickness?

A. It's a—form of a—personality disorder or an—inadequate personality that has nothing to do with whether he knows he difference between right and wrong, for instance. He does. But it's a—a person who [938] is not like, I assume, most of us here, but he—it's a personality disorder.

Q. Well, do we have that personality disorder, the typical person?

A. The typical person does not, no.

Q. It's not average?

A. No, it's not.

Q. What type of treatment is available for a person with this type of disorder?

A. Well, this is the type of person who is usually seen in Courts on trial, and when they're adjudged to be not insane, to know what they're doing, they're usually treated as a criminal, and the Court takes care of the punishment.

Q. Let me—

COURT: Let him finish now, Mr. Pugh.

A. There are, of course, cases who, with a personality disturbance, they are, hopefully, they can be some help in changing a personality; and a person like this, an attempt is made with psychiatric help and maximum security type prison or hospital, to see if something can be done.

BY MR. PUGH:

Q. Would be your recommendation for [939] treatment—

MR. PERSON: Judge, let me take something up outside.

COURT: Ladies and gentlemen.

(At this time, the jury then retired to the jury room)

MR. PERSON: Judge, the ultimate issue in this whole case is life or death and I would object to—to the—Doctor Pile giving his opinion whether the man should be given life or given death.

COURT: Of course. Of course.

MR. PERSON: That's the reason. They asked him what his recommendation would be and I would assume that was the question he was eliciting.

MR. PUGH: I withdraw the question, Judge.

[949] COURT: All right.

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

(The Defendant was present, seated at counsel table.)

COURT: Any further questions?

MR. PUGH: Yes.

BY MR. PUGH:

Q. Doctor, what causes a disorder of the type you diagnosed Mr. Smith had?

A. I'm sure there are a lot of theories, what causes this type of condition, and—I don't think there's any one that really

knows. Like a lot of psychiatric conditions, we know the symptoms, and unfortunately we don't know the cause for a lot of them. And—in this particular case, I would have no idea what the cause might be for this particular problem.

MR. PUGH: That's all I have.

COURT: Any further [941] questions of the Doctor?

MR. PERSON: No sir.

COURT: Any futher need for the Doctor?

MR. PERSON: No sir.

COURT: Doctor Pile, you may be excused.

MR. PERSON: Thank you, Doctor.

COURT: Who is next witness?

MR. PERSON: Doctor Dimitris.

Testimony of Dr. James C. Dimitris
November 3, 1977

DOCTOR JAMES C. DIMITRIS, called as a witness by the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q. State your name, please, sir.

A. James Christian Dimitris. The [942] spelling is D-I-M-I-T-R-I-S.

Q. What's your occupation or profession, Doctor?

A. I'm a physician, psychiatrist. I'm Director of the Criminal Division of Psychiatry at Central State Hospital in Petersburg.

Q. Would you tell the ladies and gentlemen of the jury a little bit about your education?

A. Yes sir. I completed my studies in medicine at the National University in Athens, Greece in 1955. From 1955 to 1960, I specialized in the field of internal medicine, and at the same time I completed my duties to military service of the country. In 1960, December, 1960, I immigrated to Montreal, Canada, where a—I again went through internship in various French and Canadian hospitals of the Montreal area for two and a half years. Subsequently, I passed the educational board, exams for foreign medical graduates. In 1963, I came down to Suffolk, Virginia, where I practiced in the field of general practice for two years. During that time, I passed the State Board of Maine and the State Board of Virginia in medicine; and in 1965, I enrolled into the field of psychiatry at the Medical College of Virginia Hospital in Richmond. This is a three year program, which I completed in 1968. From 1968 to date, I have been working at Central [943] State Hospital in Petersburg, Virginia, in the field of criminal psychiatry. Up to '72 as assistant director of the unit, and from '72, from '72 on as director of the unit.

I have also published some work in the field of insanity, published in—the Virginia Bar Association magazine, in June, '75. Along with—Mr. Thistem, who is a substitute judge in Lancaster, Virginia.

Q. Doctor Dimitris, did you have an occasion to examine Michael Marnell Smith?

A. Yes sir.

Q. Would you identify him, for the record? Is he sitting in the Courtroom?

A. The gentleman sitting next to the Defense Attorneys.

Q. All right. Did he come to Central State, pursuant to a Court order?

A. Yes sir, issued by the General District Court. For the record, I can tell the date we received the order. July 1st, 1977, by Judge Zepkin.

Q. And how long did he stay at Central State?

A. From July 5th of this year to August 23.

[944] Q. And did you have an opportunity to examine and talk to him during this time, and observe him?

A. Yes, if I may explain, for the benefit of the jury, our process. When we receive a person under the order of the Court, he's undergoing physical examination, laboratory exams, pertaining to his physical condition. Then we have around the clock observation in three shifts of the place that he's housed at, and he's undergoing psychiatric interviews and also psychological testing. Occasionally, we have also the benefit of other examinations which have been done prior to that mission, or some other time earlier, with the person who was in need of other examinations or treatment. So this has been accomplished.

Q. All right. Now, and he was sent to you to obtain your opinion as to whether he knew right from wrong, is that correct, and whether he was competent to stand trial?

A. Right. The question of the Court was what was his condition, if he was able to establish right from wrong, and, of course, the condition of the time, at the time of the alleged offenses.

Q. Now, were you also provided with a statement that he allegedly made in regards to this [945] particular case?

A. Yes, this is part of the record, also.

* * *

Q. Now, I show you the statement of Michael Marnell Smith, and ask you whether or not, in regard to this case, and ask you whether or not you have a copy of that statement? If you would check that against your copy.

(At this time, the witness perused the document.)

A. Yes, it seems to me that is the exact copy of what I have in my files.

[946] COURT: For the record, Mr. Person, that's Commonwealth Exhibit what?

MR. PERSON: This is Commonwealth's Exhibit Fifteen in the prior hearing.

BY MR. PERSON:

Q. Now, Doctor Dimitris, based on your evaluation during this time Mr. Smith was at Central State, and based on your interviews, and based on the testing that was conducted over there, do you have an opinion as to whether or not Michael Marnell Smith was competent to stand trial?

A. Yes. Mr. Smith, the Defendant, was able to understand the charges that were pressed against him. That he was the Defendant, and that he was supposed to be tried. He had options in the trial between jury and judge trial, and if he wanted, and also that—he had awareness of what transpired during this alleged offenses. And, to our judgment, he was considered able to relate those—this information to his Defense Attorneys, to assist them for the preparation of his defense.

Q. Based on your evaluation, which consisted of observing him at the time he was at Central State, and your interviews with him, and his prior history, [947] and assuming that the statement that Michael Marnell Smith gave, of which you have a copy, are the true facts concerning what happened on May 23, 1977, assuming all that, do you have an opinion as to whether Mr. Smith knew right from wrong at that time?

A. Based on the information received from the authorities, the statement the accused had made earlier to them, the interviews at Central State, which dovetailed with what he said to the authorities, and the overall evaluation, including psychological evaluation of the accused, it is my opinion, and it is an opinion, that the accused knew the nature, quality and the consequences of his acts. To be specific with this, I mean to say that—he knew that when he was approaching the victim and was walking toward the wooded area, where the rape took

place, that he had a purpose for it. The purpose became evident when he pulled the knife and ordered the victim to comply with his wishes. He knew that sexual intercourse was taking place against the pleadings and the wishes of the victim, according to his own admission, and because of his anticipation and fear that this victim could report the event to the authorities, he proceeded to choke his victim to death. Therefore, I come to the conclusion to opine, to evident an opinion, to say that he knew what was going on, and it was his clear-cut awareness [948] and choice.

Q. And that he knew right from wrong?

A. Was aware that the activities were wrong and objected to by society.

MR. PERSON: Answer Mr. Pugh or Mr. Wood's questions.

CROSS EXAMINATION

BY MR. WOOD:

Q. Doctor Dimitris, what type of mental disorder does Michael Smith have?

A. Our evaluation at Central State indicated that the Defendant manifested signs of what we call inadequate personality. By saying so, we mean to say that the person has basically a more than the average person accentuated inferiority complex. In other words, every human being has understanding of limitations that we are not perfect, we're not omnipotent. We're weak. We try to do something about it. We try to learn better, to cope with life, to really endure through this challenge, the stresses. Some people have it in a marked more accentuated form. In other words, they feel incapable to deal with the average stresses of life unless they have some kind of compensation, some type of reassurance that they're strong, [949] they're good, successful. Maybe the element of success is what—is—impinging in their minds of these people. And to define success is something which is very, very hard to do. So,

basically, the existing, the widespread feeling of inadequacy, of weakness, of inferiority is more accentuated in some people, and then they call them inadequate personalities.

Q. Doctor, is this a mental or emotional disturbance?

A. This is included in the diagnostic manual of the American Psychiatric Association as a mental disorder.

Q. What causes this condition, Doctor?

A. The expression is that many highways lead to Rome, and many causes can lead to somebody to become—to have inferiority complex much more pronounced, much more intense than for the average person. Usually expectations of the family, being the first son of the family, for example, the father, the feminine looking up for leadership, for success. Can lead into the person's feelings of—"I don't measure up to what they expect of me. I have to do something to compensate for this vacuum." Not closeness to the father, for example, sometimes leads to this feeling, "Because the father rejects me, therefore, [950] I'm no good." Being no good is awful, you have to do something to compensate for no goodness. Many reasons can lead to the person to feel inferior and inadequate.

Q. When does the condition like this usually develop, Doctor?

A. Usually, but not necessarily, starts in the early childhood. The third, the fifth year, the sixth year of life. It's critical where the child understands the environment, understands expectations. He is able or she is able to understand how the people react and treat him or her. And at that time, feelings, though the individual starts to develop, and start, become part of his existence.

Q. You did not determine that he was a sociopath, is that correct, Doctor?

A. No sir, in our evaluation this—this was not the finding. We didn't find evidence of sociopathy.

Q. How many days did he spend with you, Doctor?

A. It was from July 5th through August 23.

Q. Doctor, in your opinion, can any psychiatrist determine that anyone is a sociopath just sitting down and talking to them for a period of an [951] hour?

A. Its possible. It depends what material comes through in this hour. The quantity is not always critical. It is essential, but not critical for the conclusion. It depends what comes through this hour. If in fifteen minutes, sometimes you can have evidence of—of a panic or mental breakdown, or you might need many, many more hours to come to the conclusion. It depends how the person interviewed cooperates with you, how frank he is or she is, and what material comes through this interview.

Q. Doctor, you're familiar with the term "garbage can diagnosis," are you not?

A. I heard it, but—I don't use it. Therefore, I'm not familiar, exactly.

Q. You know what it means, don't you, Doctor?

A. Kind of—catch twenty-two deal of lumped up and put it somewhere. This is my interpretation, but maybe I'm wrong with it. I don't know.

Q. Don't psychiatrists use sociopath when they're generally and it's generally described as what has been known as a garbage can diagnosis, that is that he couldn't really determine what the problem was, so he just sticks it under sociopath?

[952] A. I have no awareness of how other psychiatrists deal with the puzzling question of what the human being manifests and what it's all about. Maybe they come to simplifying the situation. I don't know. I haven't—no way to tell you for sure. I have heard various explanations as to how this is dealt with. I believe the person who does it has to explain what he or she does. I don't second guess others.

Q. Doctor, you're familiar that it does happen, though, aren't you, sir?

COURT: Mrs. Renz.

MRS. RENZ (JUROR): I wonder if the Doctor could explain to us why they did not determine what Mr. Smith was—a sociopath and again give us the difference in definition between a sociopath and an inadequate personality.

A. I'll be glad to. Which is the priority.

COURT: The priority is with the juror.

A. Thank you, sir.

The sociopath, ladies and gentle[953]men of the jury, is a person who is—self-centered. He's the one existing, and nobody else is. The individual is an object, is a thing. He's callous, indifferent to human suffering and—and torture. He's—getting excitement, sometimes and oftentimes, by the suffering per se. For example, he can put the house on fire, and then, instead of calling the police or anybody, he will watch firefighters doing their job and be excited out of the suffering of the firefighters and the people who evacuate the building, if they manage to do it. In other words, it's a person that is operating on the pretext if it is—if it feels good, do it. Which can—be devastating, really, to society. This is the reason they call it antisocial, which is against society, or sociopathic. He is existing; everybody else is supposed to serve his needs, his whims, his feelings.

The inadequate person is a person who tries to compensate, oftentimes, this feeling of inferiority, and go overboard for that. He can go into great risks, in the first line of operation, front line of operation. For example, this is life, risk his life, even though he is not properly covered, he's not having the chances to make it through. But he's going to go for that. This is a big thrill, a challenge. To do it, and that's when you give it, "I am somebody; I'm [954] successful; I'm useful; and I am not the little man. I'm not the almost nothing." So the inadequate

person fights his own feelings of inferiority, and he can go overboard for that in a healthy or nonhealthy way. He can prove to himself, "Otherwise I have done thus and thus, and, therefore, that proves I'm not a nothing. I'm somebody. I have raped this woman, what I have, did whatever, therefore, I am somebody. I'm better than this person who is the victim." People can switch over from—not the pigeonhole, they have to stay with it. The person as long as is not—with confusion of the mind, which we call psychotic in the psychiatric jargon, can make choices and move out of one situation to another. He's not supposed to stay rigidly with that, or he can stay, too, usually repeating himself.

So it's some kind of—substantial difference between sociopath and inadequate person. Even though there are similarities.

BY MR. WOOD:

Q. Doctor, is a sociopath likely—

COURT: Just a moment. Mrs. Robertson.

MRS. ROBERTSON (JUROR): A person can move from one to the other, is that what you're saying? [955] In other words, can a person have both those traits, both those ideas? In other words, can he have both those—

A. You can have, basically, the sociopathic trend, or can it be inadequate and be also sociopathically inclined. Nothing deprives the person to have traints of the other.

BY MR. WOOD:

Q. You determine in your diagnosis, did you not, sir, that he did not have a sociopathic traits?

A. Not only mine, it was a team evaluation. In other words, the rest of the team, psychological member of the team, my assistant, and other members of the staff through the evaulation observed, neither we found through testing that the evi-

dence of sociopathy. As human beings, we might have failed that. Don't—it's not a gospel at this.

I will tell you what we have been able to achieve and how far we could carry on the ball. This examination, we have not found clear-cut evidence of sociopathy.

Q. Doctor, so this diagnosis is not only yours, it's your whole team, is that correct?

[956] A. That's correct, sir. It is traceable through the records; it is not one man's conclusion.

Q. Doctor, is a sociopath, who has committed a crime, such as this crime, likely to confess to it and break down and cry about it?

A. That's not a cardinal—characteristic of the sociopath. Usually the sociopath try in every way to be elusive, to evade detection, to give hard time to the authorities. But I have to admit that—when the evidence is so hard against him, the sociopath might go to the other extreme and become a meek, easy going and cooperative person, because he understands that—"I have no way to fight it out. I might as well join them." Then he might break down and cry and give cooperation, because anything else is worse. So it's the better of the many evils.

Q. Without any evidence against him, is he likely to confess everything to the authorities and break down and cry?

A. Usually not.

Q. Doctor, you say this condition begins in the third, fourth, fifth years of life, is that correct?

A. Usually, but, as I say, social [957] experiences can—any time later influence the person in developing—

Q. Excuse me. Did you determine in this particular case as to what caused the mental disorder of this particular Defendant, Michael Smith?

A. No, we're not able to pinpoint exact causes to it. We were unable to understand the scars of it, so to speak, but what—situation that led into this scars, cutting with glass, with knife, with a fork, with—with any other substance, ordinarily we can't pinpoint, and say that was the reason. The fact this man is the first child out of many, twelve probably in the family, and that has a little to do with what the father was able to achieve in life, and what the first son is supposed to do. This is—not an unusual situation in few or several instances. But, as I say, looking later on scars, it's hard to characterize the cause of it.

Q. Did you determine that it was a long lasting illness, sir, I mean that it wasn't just something that came to pass in the last few years?

A. What we were able to determine, that some people it was existing and vivid. The length of it is something which—is very hard to determine, as was the causality. When you see a scar, you have to go into hypotheses, how long the scar exists, how it was [958] caused. You have no—definite valid proof to it.

Q. I understand, sir, but did you, in fact, form a hypothesis in regards to this particular case, from the history of this Defendant?

A. Our belief, our opinion is this was existing at least through adulthood from adolescence on. From adulthood on, but this is our way to understand the situation, his inadequacy. As I say, something which we cannot prove in any way through graphic or through some kind of x-ray or any other way to say yes, it was the twelfth year that led into that.

Q. To your knowledge, sir, and the prior history did you obtain from this Defendant, Michael, has he ever had any treatment before, sir?

A. No, he hever was exposed to any treatment before.

MR. WOOD: No further questions.

MRS. RENZ (JUROR): In your opinion, or did you form any opinion as to whether or not he would benefit from treatment or whether—to what extent psychiatric assistance would change this pattern of [959] behavior?

A. I'm very appreciative of this question, because that—would give me an opportunity to explain what psychiatric treatment can do for personality disorders.

As I explained earlier, personality disorder is something which part of the existence of the person, probably after the third year of life on. In other words, is a way the person feels, thinks and reacts in his every day life and his actions. Every day life business, dealings. Treatment in this case has to be an alliance or a partnership between the therapist and the therapee, between the patient and the therapist. It can always be a strong lasting existing one. It is not like somebody who goes to the surgeon and has an appendectomy, and that's over. This is something the person has established, a way to deal with life. Unless he or she believes this is not the proper one, "that I want to change," and then ask for the guidance of the psychiatrist, no result is going to come of any importance, or if any of the person understands better ways and means, there is no guarantee that definitely he is going to adhere to it.

It is a matter of determination and decision, because the person can exercise will and determination. It's not like the confused schizoprenic [960] person who doesn't know what goes on. You have to give him Stelazine, something intramuscular, to snap out of it. Here the person is not passive, but is active. Is engaging in the transaction with you, has to be in partnership. In partnership situations, there is a chance for the person to change, but at the same time it's a chance for him not to change.

MRS. RENZ (JUROR): The partnership situation would not exist unless the person, who had the disorder, was willing to really make the effort to change?

A. Yes mam.

MRS. RENZ (JUROR): It would have to be strictly in cooperation?

A. Always lasting cooperation. It is not like—making some magic for him or hypnotizing him or giving him ten shots of Thorazine and changing him. No. the medical approach that we go to the medical doctor, and he gives us a shot and—we have no tonsillitis any more, is not applicable.

BY. MR. WOOD:

Q. Doctor, you're saying if the man is [961] cooperative in this treatment, that he can benefit from treatment, is that correct?

A. Yes.

Q. I asked you all the period of time that Michael Smith was with you up at Central State, for the criminally insane, was he cooperative with you, sir, throughout that period of time?

A. Yes, we had good cooperation with the Defendant. He was a good patient. We didn't have any problem in regard to infraction of rules and regulations of the unit. Or any violent situation, you know, with his presence.

MR.. WOOD: I have no further questions.

COURT: Any redirect, Mr. Person.

MR. PERSON: Yes.

REDIRECT EXAMINATION

BY MR. PERSON:

Q. You did say there's no guarantee that he wouldn't commit the crime in the future?

A. Yes, I say that you can learn your ways and means of adopting in life, and then you can [962] opt to go back to the previous ones. It doesn't mean because you have learned to know about yourself you're going to do it. You have broader options in life to do otherwise for your feelings and inferiority.

You might decide, "I don't care for that. It suits me fine to do otherwise." This is the trouble with psychiatric treatment. It's long, vague and indefinite.

Q. And one of the ways you can decide that is what a man has done in his past life, isn't that correct?

A. I'm sorry.

Q. One of the ways you're going to decide about the future of what somebody is going to do is what he has done during his life?

A. Yes. This is—a way to understand or to anticipate actions in the future. Of course, you cannot talk in absolute terms for that either. In other words, the human being is a magnificent computer in regards to his mind. I can see a loaf of bread and plead for a slice of it. I can grab it. I can work hard to have it. I can go to the welfare to get money for it. I can go to the Salvation Army and give me a slice there. So there are many ways to deal with some stimulus, and how the human being is going to deal to stimulate in the future is very hard to predict. Psychiatry usually deals with the [963] past, to understand and modulate the better future. It is very hard to predict the future, though.

Q. Can you tell the ladies and gentlemen of the jury the difference between your diagnosis of personality disorder and insanity?

A. Insanity is a medical-legal term, which indicates that the person, because for mental illness or defect like retardation, is unable to understand the name, quality, consequences of his acts, or to understand right from wrong. Or that he is so much void of will, he's like an automation that—even though he understands right from wrong, still he cannot control his impulses.

Well, personality disorder is a mental disorder. It's something deviate from the psychiatric norm. Which says the normal person has to be able to work, love and learn. This is—our

tried in simplistic terms of health. The person has to be able to work, to learn in life, and also to live some other person except himself.

Well, from this concept of mental disorder to the point of insanity is a wide gap, because it means that the person is so much confused, so much altering his ability to think, to feel and to act, to the point that—he's not able to understand what is [964] going on with him or her. Or even if she understands, for example, the paranoid schizophrenic person is a person that has serious mental disorder, knows that pulling the trigger and shooting somebody is going to kill, but the person who is going to be killed deserves to be killed, because he is the traitor of the country. So, you see, that alteration in his mind of the proper feeling, there's no evidence to it except his own fantasy leads him to believe that this person, who is about to be killed, is a traitor. He knows it's a pistol, it's a bullet, it's going to penetrate the body and kill, but in his or her mind, this is a justifiable act.

So we don't have any alteration of that kind, of understanding reality. Reality is understood in the mind of the personality disorder, but is ignored. "So what? I want to do my thing.

COURT: Is Mr. Person through? You'll have a chance.

MR. WOOD: I know, sir.

BY MR. PERSON:

Q. Now, a person who had committed a crime, and thought that the law enforcement officials had enough evidence to convict him, if he just thought it, could be a sociopath and could tell them about it, is that [965] correct?

A. Mr. Person, you try to ask me an important question, which I don't get—would rephrase the question?

Q. Is the typical situation that a person who—in this, for instance, is this case, is it consistent with Mr. Smith, thinking that law enforcement officials had the evidence against him in the case, for him to confess?

A. Let me see if I got it straight. Well, the question is if Mr. Smith decided to confess after he felt that it was overwhelming evidence against him. It might have been so. I have no way to—to say that he was overwhelmed by the evidence or was overwhelmed by the fact that he took a life, and he did as he did that particular time. It's very hard to differentiate what is what. Maybe a little bit of both. Maybe the feeling that—it was searing in the area he was living at, at that time was crucial. In other words, no specific reason for something. In other words, there might be a gathering of his amalgamation. There were many reasons to go lead to his decision.

Q. There could be many reasons for that, is that correct?

A. Yes.

[966] **RECROSS EXAMINATION**

BY MR. WOOD:

Q. Mr. Person asked you a question about a guarantee, about future conduct. Future criminal activity. Doctor, you can't guarantee that anyone in this room is not going to commit a criminal crime in the future?

A. No.

Q. And in regards to this judging what's going to occur in the past, that Mr. Person related, by what's happened in the past, I'm sorry, judging what's going to happen in the future by what's happened in the past, without treatment interjected into that history, that wasn't a relative judge for the future, is that correct? Do you see what I'm saying?

A. You interject the element of treatment as a crucial point in making a difference for the future?

Q. Yes sir.

A. Yes, the only thing that—as I say, the commitment of the person to—is the difference. This can be achieved with the help of minister, the help of social worker, any person that will

be in alliance with the person, who will determine, who is determined to make a difference, can make the difference. [967] Yet the difference would be what comes out of their awareness. You can be tremendously impressed, like, for example, you know that you have pneumonia, and then you opt to go out and have a walk with just your shirt, nothing but that. You feel, "I feel fine. I don't want my overcoat. I don't want to do the new things you tell me. I know about it, but still I want to do things my way."

MR. WOOD: I have no further questions of the Doctor.

MR. PERSON: I have one more.

REDIRECT EXAMINATION

BY MR. PERSON:

Q. Most people who commit rape and most people who commit murder, rape and murder together, have at least a personality disorder, is that correct?

A. Yes sir, if it's a trend of life; in other words, it's not just something which—happened because they got intoxicated and then they got confused, they didn't know what was going on. They're sober; they're well placed together person, who will decide to do that, [968] time and again, it seems that has to have some personality disorder. Something make them tick.

MR. PERSON: No further questions.

RECROSS EXAMINATION

BY MR. WOOD:

Q. Doctor, then the answer, as I understand it, to Mr. Person's question, is that most persons, who commit rape and murder, have personality disorders, the answer is no, is that correct?

A. I said yes.

Q. Yes, with the further condition that it's a—a previous pattern involved with that person, is that correct?

A. Usually, it's a pattern of activity.

Q. But a person who gets out and commits rape and murder, with no prior history or pattern of that particular action, does not have a personality disorder, necessarily?

A. Not exclusively.

Q. I understand.

A. Not exclusive.

[969] Q. Necessarily, he doesn't have to have a personalithy disorder?

A. Not exclusive.

REDIRECT EXAMINATION

BY MR. PERSON:

Q. When you reviewed the Defendant's history, there was a pattern of this, is that correct?

A. Yes sir. It's an element of tendency to be involved in at least that sexual aspect of this behavior with some tendency either for the part which came about, which is the murder.

Q. And did you—as far as your history, did you know that he had been convicted of rape prior to this?

A. Yes sir.

Q. And was that taken into consideration when you evaluated this thing?

A. Yes sir, he told me that, and he told me that he was, you know—just a parolee from the system.

Q. And is your—have you had an opportunity to review the facts of the first rape in reaching your conclusion today?

[9670] A. I have seen the statement of the first offense.

Q. And what was that?

A. As to—the events pertaining to the rape and the pleading of the victim not to be—killed and this. For some reason didn't take place.

Q. So there is a pattern?

A. It is a pattern. It's repetitious behavior. It happened three years ago. It happened now. Now, if that's going to happen continuously or not, you have to go into statistics and possibilities. If you talk about an individual versus statistics, it's—that is what makes the difference.

Q. But it's a better chance it will happen again with a man who has committed two rapes than a man who hasn't committed any, is that correct?

A. It's a better chance. It's a good chance for the person to repeat himself, but there's a good chance that the person can change.

MR. PERSON: That's all the questions I have.

RECROSS EXAMINATION

BY MR. WOOD:

[971] Q. It's a lot better chance when there isn't any treatment between the first rape and second rape, too, isn't there, Doctor?

A. The first rape and the second rape?

Q. Yes.

A. Again, I have to be vague in talking chances. I'm talking about a human being with many possibilities. I don't try to be evasive. I have to admit the limitations of the trade. Of our science. The human being is a measure of the human race. It is something which—you don't have a way to say yes, because a person has done it before is going to be for sure again, the same

thing. It's a chance. As far as we can say. We cannot go more than that.

Q. Doctor, the response to Mr. Person's question was based on generalities, was it not, sir?

A. On statistics.

Q. On statistics, the person who committed rape is more likely to commit it in the future?

A. Yes.

Q. Basing that on generalities in statistics, isn't it more likely chance the person would have had treatment after the first rape?

[972] A. It's a good chance with treatment, which I explained what kind of treatment. Not a shot and miracle. This type of treatment, the person will snap out of this trend and become different. So—I'm sorry, I'm talking about chances, but this is as far as I can go and explain.

Q. And even more so, Doctor, when the person is cooperative, is that correct, in this treatment?

A. As long as the person is in alliance and believes in his goal, is the partner, as I said, the chances always are much better.

MR. WOOD: No further questions at this time.

COURT: Any further questions?

MR. PERSON: You said the chances are much better if he cooperates?

A. Yes.

MR. PERSON: That's all.

COURT: Any further questions?

MR. WOOD: No sir.

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CIRCUIT COURT FOR THE CITY OF WILLILAMSBURG & COUNTY OF JAMES CITY

Closing Arguments And Instructions To The Jury At Sentencing Phase, November 3, 1977

[1069] MR. PERSON: May it please the Court and ladies and [1070] gentlemen of the jury, we've come down to the time now where you all have got to decide between death or life. Whether the Commonwealth has proven—let me say this. The Court has instructed you, the Court has said to you that you may fix his punishment at death, number one, if there is—if the Commonwealth has proved beyond a reasonable doubt that there is a probability, based upon the evidence of the prior history of the Defendant, that he would commit criminal acts of violence that would constitute a continuous serious threat to society. So what has the Commonwealth proved about his prior history?

And the reason I read that instruction, when we all started this thing, I asked you all on Monday, and I asked you this morning, whether any of you [1071] all had any scruples about fixing death. Any conscientious or moral scruples. All of you said you didn't. Some of you said it would be difficult and painful, and there's no doubt that it is difficult and painful. But I ask you, I ask you to remember what the evidence was, the evidence that you heard this morning. All of it, the Commonwealth's and the Defendant's. Think back about it, and, as I said yesterday, we're sitting in this room free without fear or threat, with the history of this man, sitting over here, the history that he's made himself is one of terror.

Now, as I said, you all, the Court has instructed you that you all may fix his punishment at death, if the Commonwealth proved its case—proved the prior history that he would commit [1072] criminal acts of violence that would constitute a continuous serious threat to society. Now, what has the Common-

wealth proved? The Commonwealth has proved that prior to the crime you all convicted him of yesterday, that he assaulted a person on the bus. He said he did it. He says he did it. Tore her clothes off, and then decided not to do it. The second thing he did, in his history, is he committed rape. Was sentenced to twenty-five years with fifteen suspended, served approximately three, was out three months, and raped and murdered Audrey Weiler.

Now, Doctor Pile was asked, I didn't ask him. All I asked him was about the acts that were committed on the bus. Mr. Wood or Mr. Pugh asked him about his diagnosis. Certainly Doctor Pile and Doctor Dimitris agree on their diagnosis. I didn't ask [1073] Doctor Pile was his diagnosis was. They did. They said—he said he was a sociopath. And that a sociopath did things and didn't care what the law was. Selfish, did it to satisfy himself. Doctor Dimitris says the same thing. Basically, when you look at it in human relationship, he's saying the same thing. He says he certainly didn't have a normal behavior.

Well, I would certainly agree with that. He certainly doesn't have a normal behavior. But whose fault is that? Are we going to justify this, blame it on society, blame it on his family? I blame it on him. Audrey Weiler blames it on him. The first rape victim blames it on him.

And I would say to you that you can give him and should give him a death sentence based on that evidence, and you can do [1074] it solely on that evidence. His prior record. Or you'll read the instruction, or you can impose the death sentence on him for what he did to Audrey Weiler. Because you can find that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Now, it's just overwhelming that the crime was outrageously vile, horrible, inhuman, in that it involved an aggravated battery. I don't know if you can have a worse crime. You saw the pictures. He killed her in three ways. And you've heard me say it enough. By choking, with the knife, and by drowning. So I

say to you that it's under your oaths as jurors that this is a proper case for the death penalty. This is a proper [1075] case. The Commonwealth is not asking for a death penalty based on one or the other. We could, but we've proved both things, not only has his life been vile, that his history shows that he will continue to kill and murder and rape, but that this last episode was so terrible, and that's why you should give him the death penalty.

And you are instructed to look at the mitigating circumstances that would not justify the death sentence. Well, I ask you to look at his evidence and if there's anything mitigating about it, I would submit to you under the evidence, I have not seen it. Not when you balance it against what he did. And we can't forget what he did.

He does have a good [1076] family. He was brought up in a good family. His father is a good man. He worked on the dairy farm. He was a good worker. He drove a bus well, but what in the world does that have to do with raping and killing Audrey Weiler or raping a girl three or four years ago and assaulting another girl. What in the world does that have to do with it. Now, if that mitigates it, so be it. He had more advantage than most, really.

And these character witnesses, they were telling the truth. I have no argument there. They said as far as they knew, he was a good guy. Real good guy. But you didn't hear Audrey Weiler. You didn't hear the victim of the other rape. They didn't testify.

The Court has instructed you that the mitigation in a capital offense may include, but [1077] shall not be limited to the following. Capital felony, and I'm just asking you to follow the law in this case. That's the oath that you took. We wouldn't be even hearing this capital case today unless he believed in capital punishment himself. You understand that, don't you? The Defendant believes in capital punishment, because he executed Audrey Weiler without a trial. He executed her because he raped her. That's why we're here.

Let's see what the Court says about mitigation. The facts in mitigation may include but shall not be limited to the following. Capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Have you heard any testimony whatsoever of extreme mental or emotional [1078] disturbances. Absolutely none. Doctor Dimitris, who examined him, said he knew exactly what he was doing on that day. That he had one purpose when he went down there on that beach, and that was to rape and that was to kill her, so that she couldn't identify him. That he knew the difference between right and wrong, and he understood the consequences of his act.

Number two. Another mitigation may include. At the time of the commission of the felony, the capacity of the Defendant, Michael Smith, to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired. Have you heard any evidence about that, about it being impaired? He had a personality disorder. That's what he had.

[1079] And third, the age of the Defendant, Michael Marnell Smith. Well, I would submit to you that age thirty years old doesn't mitigate the killing and murder of another human being.

I would submit to you there has been absolutely no mitigation in comparison to the crimes that this man has perpetrated against human beings and society at large. And I don't ask you to give the death penalty without submitting that the evidence bears the death penalty out. That there is no doubt that this man is the man who committed these crimes, absolutely no doubt. And I would submit to you that we should guarantee, guarantee that Michael Marnell Smith will never ever hurt or injure anybody else in our society. It's just not worth taking the chance on him.

[1080] Thank you.

COURT: Mr. Wood.

MR. WOOD: Ladies and gentlemen, your task today is one of the most serious that I think anyone can be confronted with. And my heart, and I'm sure yours, goes out to everyone in this situation.

I'm not standing here and telling you that—that Michael Smith's conduct was proper or that it should go unpunished. My heart goes out to everyone that has been involved in this situation. Mr. Smith's family, Audrey Weiler's family, as I'm sure yours does.

But Mr. Person is saying to you because Michael Smith took a life, which was wrong, you should order that his be taken. That Michael Smith should be taken from here and taken to the Penitentiary on Spring Street in Richmond, and there await your sentence of death. [1081] That he should be taken and placed in an electric chair and someone pull a lever and send thousands of volts through his body. He's saying because Michael Smith killed Audrey Weiler, that's what we should do. That's what society should do with him. Audrey Weiler was a living human being, and so is Michael Smith. Mr. Person wants a guarantee, so in order to get that guarantee he wants you to burn Michael Smith.

But you know there are no guarantees in life. There are no guarantees that anyone in this room won't commit a crime some day. So how—how do we, society, guarantee that? If Mr. Person wanted a guarantee when he sent him to the Penitentiary, in 1973, why didn't they do something to help the man then? Why did not they give him the opportunity to [1082] be helped?

He spent a month and a half up at Eastern State, I'm sorry, Central State Hospital, where he was undergoing diagnostic care. He was cooperative, no problems whatsoever with him, and that's what it takes for someone to be helped under treatment. Doctor Dimitris testified to. So why didn't they offer him that care in Richmond? Why is it that a psychologist interviewed him and said he had a problem and then send him back to the cell? Why didn't they give him that help now. Then. We

probably wouldn't be here today if they had. But now you are faced with this awesome, most awesome decision.

Well, this problem that Michael Smith has is not something that he could have helped. Mr. Person asked us well, who do we blame. He said, "I blame it on [1083] him." At three years of age, at three years of age, Mr. Person—Mr. Person would have expected Michael Smith to say, "No, I don't want this illness. Take it away. Take it away. I don't want it." What caused the illness? I don't know.

You know what his family is like, and I have nothing whatsoever against religion or christianity or any faith anyone wants to believe. But he was brought up in one of the strictest environments possible. You've heard what the teachings of their church is, and I'm not saying that the teachings are wrong. It's a very good teaching, but I can see what has happened to Michael Smith. Subjected to this constantly, subjected to the teachings of the faith constantly, coupling that with the fact that he was brought up on a farm, never had an outside job except a bus driving job when [1084] he was fifteen years old, and went to Vietnam to fight for us. Those are the only two jobs he ever had outside of the farm. And I'm not saying being raised on a farm is bad. I wish I would have had the opportunity, but think of all these pressures, that coupled with the fact that he was the oldest child. But when he was three or four or five years old, Mr. Person thinks that—Michael Smith should have said, "No, I don't want this—illness. Take it away."

He said in his statement that—that "I don't know what makes me do this. I don't know what makes me do this. I need help." Mr. Dunford said he needed help; he would try to get him help through the Commonwealth Attorney. Why didn't somebody give him help in 1973? I'm asking you to give Michael Smith that opportunity, to give Michael Smith the opportunity to have some [1085] treatment for this illness. We don't take someone out that has pneumonia or cancer and take him up to Spring Street in Richmond and strap him in a chair and throw

thousands of volts to them. We treat them. True, they have not committed a crime. But their illness did not cause them to commit a crime either.

I agree with Mr. Person that it is not normal behavior to commit murder. I agree with him wholeheartedly. And Doctor Dimitris says he is not—does not behave normally, but he goes further than that and says Michael Smith has a mental disturbance, mental disorder. And you've heard of what treatment he's had in the past.

Joyce asked Mr. Smith what did the church do when Michael got out of prison. "Well, we patted on the back, and we—we accepted him back in the fold." That's the [1086] treatment that Michael Smith has been offered since 1973, when this first rape occurred. Doctor Dimitris says that Michael Smith can be helped if he's cooperative, and you heard how cooperative he's been throughout this matter.

He can be helped, and all we ask you ladies and gentlemen is that you conserve human life, as I believe it is proper. That you conserve his life and allow him the opportunity to be treated for his illness, just as if a person with pneumonia can be treated for theirs. I leave—his life in your hands and in your minds, in your contemplations and your deliberations today. And I ask that you spare his life, as I ask that all life be spared.

MR. PERSON: I would submit to you that it's nobody's fault but Michael Marnell Smith. Mr. [1087] Wood says, "Look how cooperative he has been." Have you seen any cooperation? Have you? If you call two rapes and one violent murder cooperation, it's unbelievable. He talks about his life. Who had a better life than he's had. He said he couldn't help himself. You read the statement again when you get in there. Read it. Couldn't help himself. He said he intentionally murdered with his hands and knife and drowning, intentionally did it, so he wouldn't go back to the Penitentiary. Couldn't help himself. He made that choice. He weighed the odds and made that choice. Couldn't help himself. I don't know what—Mr. Wood said, "I

don't know what makes me do it. I don't know what makes me kill and murder, so I don't have to go back to the Penitentiary."

[1088] He came out of the Penitentiary, back three months. His family accepted him back in. His father said they trained him, he accepted it. And with that time, as Doctor Dimitris put it, he went down to that beach for one purpose, and he accomplished that purpose.

There's no mitigation. Absolutely none. When does it stop? When does somebody deserve to die for the crime that they have committed?

I would say to you all in all sincerity, and it is painful, it is painful, and it is difficult, but you all did take an oath and did say that you would abide by the law, and did say that you would fix death in a proper case. And this is a proper case, I would submit to you. I just don't think and would submit to you that we can't make a mistake about it. [1089] This cannot happen again. We, all of us, have to insure that. And you're the conscience of the community. And it's in your ball park, and I'm sure it's painful and difficult, but we all reach a stage in life that we have to make these large decisions and live with them. You're going to have to live with it.

Somebody said it better than I did. Let us have faith that a government of the people, by the people, and for the people would demand that an extreme situation, such as this, that there is only one proper penalty, the supreme penalty. And in that faith, let us to that end dare to do our duty as we understand it, for you have sworn a true verdict to render according to the law and the evidence, so help you God.

Regardless of how difficult your duty becomes, it is mere child's [1090] play to what Audrey Weiler was forced to endure, and we can't forget that. We can't forget that first rape case. We just can't forget those things, sitting in this Courtroom. To infer by your verdict that the life sentence under the law of our State, that that would be a proper punishment in return for

what this man has done to these people, to society, would just be a charade.

And I say that to you and know when you go back in the jury room, remember that you didn't cause this to happen. You did not cause this to happen. This man has already determined that capital punishment exists in this country.

Thank you.

COURT: Ladies and gentlemen of the jury, you shall retire and retain the same foreman or elect a new one, as you see fit, to preside over your deliberation.

[1091] I have written two possible verdicts. And they are only two. This is the penalty of death or life imprisonment.

In order that you give the death penalty, you must find that, that Instruction Number One, that the conduct—there is a probability, based upon the prior history of the Defendant, that he would commit criminal acts of violence and would constitute a continuing serious threat to society. If you find that in this case, beyond a reasonable doubt, then you may impose the death penalty. Or if you find that in this particular case the actions of the Defendant were so that—outrageously or wantonly vile, horrible, inhuman, in that it involved, one, torture, two, depravity of mind, or aggravated battery of the victim, if you find [1092] one of those three things existed as a result of this crime, you may impose the death penalty.

I have written this verdict, and I'll read it to you. "We, the jury, on the issue joined, having found the Defendant guilty of willful, deliberate and premediated kiling of a person during the commission of or subsequent to rape, and that," and this is in parentheses, "(after consideration of his past criminal record, that there is a probability that he would commit a criminal act—would commit criminal acts of violence that would constitute a continuing serious threat to society)," end of parentheses, "or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman, in that it involved," and again in parentheses, "(torture),' closed paren-

theses, parentheses again, "(depravity of [1093] the mind)" closed parentheses, parentheses, "(aggravated battery of the victim)," closed parentheses), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

If you ladies and gentlemen decide on the death penalty, I will ask you on this verdict to strike out those—one of those four items that you do not consider appropriate. In other words, leave in the one on which you base your verdict, should you find the death penalty. Or if you find two reasons for it, you may leave those in. But otherwise just scratch out with a pencil those things you do not find. Do I make myself clear?

Now, the second verdict is, "We, the jury, on the issue joined, having found the Defendant guilty of willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape, and having considered all of the evidence and the aggravation and mitigation of such offense, fix his punishment at imprisonment for life."

One of those two verdicts, ladies and gentlemen, should be rendered by you. Are there any questions before you retire? If not, you can retire and deliberate as to what the penalty in this case should be.

* * * *

[1102] CLERK: "We, the jury, on the issue joined, having found the Defendant guilty of willful, deliberate and premeditated killing of a person during the commission of, or subsequent to rape, and that (after consideration of his past criminal record, that there is a probabilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman, in that it involved (torture) (aggravated [1103] battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death. Signed Adolphus G. Bradshaw, Foreman."

* * * *

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG & COUNTY OF JAMES CITY

INSTRUCTION NO. 1

The Court instructs the jury that the penalty of death shall not be imposed unless you find that the Commonwealth has proven beyond a reasonable doubt that:

1. There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he has been found guilty that he would commit criminal acts of violence that would constitute a continuing serious threat to society,

or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim;

You may fix his punishment at death.

If you find that the Commonwealth has failed to prove either (1) or (2) above beyond a reasonable doubt, or if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment.

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG & COUNTY OF JAMES CITY

INSTRUCTION NO. A TO THE JURY

The Court instructs the jury that when determining the punishment to be imposed for a conviction of capital murder, you shall consider the circumstances surrounding the offense, his history and back ground of defendant Michael Marnell Smith, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following (i) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (ii) at the time of the commission of the capital felony, the capacity of defendant Michael Marnell Smith to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (iii) the age of defendant Michael Marnell Smith at the time of the commission of the capital offense.

August 15, 1977

James C. Dimitris, M.D.
Post Office Box 4030
Petersburg, Virginia 23803

Re: Michael Marnell Smith Reg. No. 83258

Dear Dr. Dimitris:

As I have previously advised you, I represent Michael Marnell Smith with respect to certain charges now pending against him the the Circuit Court for the City of Williamsburg and County of James City.

This letter will confirm our telephone conversation wherein you informed me that you would confer again with Mr. Smith prior to his return to this area. I have advised W. L. Person, Jr. the Commonwealth's Attorney, that I would request from you copies of the evaluation reports conducted on Mr. Smith, including, but not limited to, psychiatric, psychological and sociological reports. Mr. Person has indicated that he would have no objections to your providing me with this information. I would, therefore, request that you forward these items to me at your earliest convenience and I am forwarding a copy of this letter to Mr. Person for his filed and information.

I have also advised Mr. Person of the fact that you could not be available on the date that this case is presently scheduled for trial.

Your cooperation and assistance in this matter are appreciated.

Very truly yours,

David F. Pugh

DFP/ak

cc: Mr. W. L. Person, Jr.
Commonwealth's Attorney

PILE, COX, ROEBUCK & SOLOMON
530 E. Queen Street
Hampton, Virginia 23669

October 1, 1977

The Honorable Russell M. Carneal
Judge in the Circuit Court for the
City of Williamsburg and James City County
Williamsburg, Virginia 23185

Re: SMITH, Michael Marnell

Dear Sir:

This person was brought by the Williamsburg sheriff to the undersigned's office October 1, 1977, handcuffed. He seemed cooperative in the interview. He mentioned he was 31 years of age, born February 25, 1946. He was questioned closely about his reason for being in jail, and he stated that on May 23, 1977, he was involved in raping and killing a woman on the beach off Colonial Parkway. He described the episode as visiting this woman, talking to her for about 5 minutes, he told her to come with him, he propelled her down the beach about 1 mile, told her to take her clothes off, which she did, had sex with her in the vagina, had an orgasm, then he choked her and threw her in the water. He said that he was afraid that she would tell on him. He states that he had been in jail before for rape in 1973 till January 25, 1977. The client was asked if he had ever raped anybody before that episode, and he said that his lawyer told him not to talk about that. He states he has never killed anyone before. He has worked on the dairy farm for the Gospel Spread Church all his life. His father manages the farm, and apparently many of the brothers and sisters of the patient work there as well. There are 7 brothers and 4 sisters.

Patient is married and there are 3 children. He denies any sexual problems with his wife, states that he has sex with his wife if he can once or twice a day, but sometimes it may go a little longer than that. He has never been under psychiatric treatment except that he was examined at Central State as a

result of this charge. Patient relates that he went into the Service in 1965 and stayed until 1969. He was in Viet Nam where he served as a cook and was not involved in any killing of Viet Namese while he was there as a part of his duties. He denies being involved with either drugs or alcohol. In discussing more of the patient's problem, it was noted that he has never raped anyone who was Black. He said he came close to it one time with a girl who was riding the school bus which he was driving, but after he tore her clothes off he thought better of it and did not do so. He stated that otherwise he had had no feelings of wanting to rape until he got out of the Service. He admits that he has this compulsion to rape and thinks about it a good deal and with many people he sees. He hopes now that the Holy Ghost will restrain him. When asked about this particular problem, he says "every man has a weakness." He then goes on to relate that some people drink, some people smoke, and some people have other problems. Patient relates that he is a high school graduate. He speaks without a whole lot of feeling, but he does say that he did feel bad that he killed this woman, that he cried about it. He doesn't show a great deal of emotion at this particular time. Since the 2 cases of rape he talked about involved White women, he was asked if he had the same feeling toward Black women and he states that he probably does, but that since there are more White women that live around his area, he would have more opportunity to rape White women. He denied any White hostility and says some of his best friends are White.

MENTAL STATUS indicates a man who is rather thin, who is well oriented to time, place, and person, and has a clear sensorium. There are no delusions or hallucinations. He does not hear God's voice. He feels that God directs him to read the Scriptures sometimes, but he doesn't hear a voice. His affect is rather bland and there is not a great deal of show of any type of emotion and no evidence of depression is noted. Memory appears intact to both recent and remote events. Insight is not present and and judgment is poor. In talking further over his sexual history, it is noted he stated his first sexual act was at

the age of 22 in Viet Nam when he paid a prostitute $5. He never had any willing sex with anyone until he was married to his wife in 1969.

IMPRESSION: Sociopathic Personality; Sexual Deviation (rape)

Patient is competent to stand trial.

Very truly yours,

/s/WENDELL J. PILE, M.D.

vm
xc: W. L. Person, Jr.
Commonwealth's Attorney
321-45 Court Street, West
Williamsburg, VA 23185

David F. Pugh
STONE, BLAND AND WOOD
Drawer H B
Williamsburg, VA 23185

STONE, BLAND AND WOOD
Attorneys at Law
Williamsburg, Virginia 23185

October 15, 1977

Wendell J. Pile, M.D.
530 E. Queen Street
Hampton, Virginia 23669

RE: SMITH, MICHAEL MARNELL

Dear Dr. Pile:

I am in receipt of your report on the examination of my client, Michael Marnell Smith. The Court Order entered September 28, 1977 which appointed you as the examining physician requested your opinion of the mental condition of the defendant at the time of the alleged offense. After reviewing your report, it appears that the above medical opinion was not rendered. I request that you might inform me of this opinion as soon as possible. Enclosed you will find a statement allegedly given by Mr. Smith concerning the crimes he is charged with. It may be of some benefit to you in assisting you in your opinion.

Also, request you might advise me as to the medical definition of one having a "sociopathic personality; sexual deviation," as well as any possible treatment for such condition.

Very truly yours,
STONE, BLAND AND WOOD

/s/David F. Pugh

PILE, COX, ROEBUCK & SOLOMON
530 E. Queen Street
Hampton, Virginia 23669

October 26, 1977

David G. Pugh
STONE, BLAND AND WOOD
P.O. Box HB
Williamsburg, VA 23185

Re: SMITH, Michael Marnell

Dear Mr. Pugh:

Based solely on the information that you included in your letter of 10-15-77, I would say that this man was fully responsible for his actions. It seems obvious that he knew precisely what he was doing and that he knew it was wrong. I do not see from this information anything that suggests he was suffering from any sort of mental disease which would have rendered him not responsible at that time. I would like to add that I also do not see any evidence of any sort of uncontrollable impulse.

I am enclosing a copy of the definition of any antisocial personality which is taken from the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association"

301.7 Antisocial personality

> This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis.

As to treatment of this personality type it is my impression that most psychiatrists would say that there is no effective

therapy and that this being so, the callous or aggressive types of these personalities should be at least permanently locked up where they can no longer prey upon people. At least this is my opinion.

Very truly yours,

HOWARD L. COX, M.D.

IN THE SUPREME COURT OF VIRGINIA

Record No. 780293

MICHAEL MARNELL SMITH,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF AMICUS CURIAE ON APPEAL OF THE POST-CONVICTION ASSISTANCE PROJECT OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW

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IV. THE UNRESTRICTED ADMISSION IN A CAPITAL SENTENCING PROCEEDING OF PSYCHIATRIC TESTIMONY CONCERNING A DEFENDANT'S POTENTIAL FOR COMMITTING FUTURE CRIMINAL ACTS OF VIOLENCE RAISES A SUBSTANTIAL RISK THAT THE RELIABILITY OF THE SENTENCING PROCEEDING WILL BE IMPAIRED AND THAT THE DEATH PENALTY WILL BE INFLICTED IN AN ARBITRARY MANNER AND THIS COURT MUST ACCORDINGLY LIMIT AND CONDITION THE USE OF SUCH TESTIMONY 51

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* * * *

SUPREME COURT OF VIRGINIA—RICHMOND
(219 Va. 455)

MICHAEL MARNELL SMITH

v.

COMMONWEALTH OF VIRGINIA
October 6, 1978

OPINION

POFF, J., delivered the opinion of the Court.

On November 2, 1977, Michael Marnell Smith was convicted by a jury of capital murder following rape. Code §§ 18.2-10(a) and 31 (e) (Cum. Supp. 1977). The next day, pursuant to the bifurcated trial proceedings prescribed by Code §§ 19.2-264.2, -264.4, -264.5 (Cum. Supp. 1977), the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's recommendation and entered final judgment November 30, 1977. Defendant's appeal and automatic review of sentence were consolidated and accorded priority on the docket. Code §§ 17-110.1, -110.2 (Cum. Supp. 1977). By leave of court, the Post-Conviction Assistance Project of the University of Virginia filed a brief *amicus curiae* is support of defendant's position.[1] This is the first capital case appealed under the current statutes.

The medical evidence showed that Mrs. Audrey Jean Weiler, whose body was found floating in the James River at a point near the Colonial Parkway within James City County, died on

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[1] We will consider the arguments advanced by *amicus* in support of the errors assigned by defendant. Some of the issues raised by those arguments, however, were never raised in the court below, are not comprehended by the assignments of error, and are not addressed by defendant on appeal. Such issues will not be noticed by this Court. Rule 5:21.

May 23, 1977 as the result of asphyxia drowning and multiple stab wounds.

Defendant signed a written statement admitting that he encountered decedent walking alone on the beach, displayed a knife, ordered her to disrobe, and engaged in sexual intercourse with her; that, fearing she "could send [him] back [to the penitentiary]", he "started choking her with both hands . . . until she went limp"; and that he then "dragged her out into the water a couple of feet", "held her head under the water . . . [until] she stopped moving", and "stabbed her in the back several times."

On brief, defendant poses multiple questions which we will address in five categories. The first category relates to pre-trial proceedings; the second to the guilt trial; the third to constitutional challenges to the statutory complex under which defendant was convicted and sentenced; the fourth to the penalty trial; and the fifth to the propriety of the penalty imposed.

I. PRE-TRIAL PROCEEDINGS

A. Jurisdiction

Defendant assigns error to the trial court's denial of his pre-trial motion to dismiss for lack of justification. Tacitly acknowledging that the crime was committed within the geographical boundaries of James City County, defendant argues that, since the land in question is owned by the United States, it was incumbent upon the Commonwealth to show that the United States did not have exclusive jurisdiction over crimes committed thereon. It is well settled, however, that the mere ownership of land by the United States does not divest a state of its jurisdiction over that land, and that the nature and extent of the federal jurisdiction is dependent upon the consent of the state. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *accord*, *Waltrip* v. *Commonwealth*, 189 Va. 365, 53 S.E.2d 14 (1949). The United States was ceded *concurrent* jurisdiction by statute over crimes committed on land to which it holds title

within the Commonwealth. Code § 7.1-21(1) (Repl. Vol. 1973).[2] Any additional jurisdiction over this land can be relinquished only if the Commonwealth executes a deed of cession, and the deed must be formally accepted by the United States. Code § 7.1-21 (Cum. Supp. 1978); 40 U.S.C.A. § 255 (1970). In light of the cession by statute, it is presumed that the Commonwealth retains concurrent jurisdiction over the area embracing the locus of the crime. To hold otherwise, would be to require the Commonwealth to prove the negative, *i.e.*, that the United States was not deeded and did not accept exclusive jurisdiction. Since defendant adduced no evidence to show the affirmative, the presumption prevails and the trial court's ruling on the motion to dismiss was proper.

B. Change of Venue

In support of his motion for a change of venue, defendant introduced numerous newspaper clippings, transcripts of radio broadcasts, and affidavits to show that the news media had given extensive publicity to the details of the crime with which he was charged, to his earlier conviction rape, and to the "outbreak of rapes in the Williamsburg-college community." Conceding that a change of venue is within the sound discretion of the trial court, *Lewis* v. *Commonwealth*, 218 Va. 31, 34, 235 S.E.2d 320, 322 (1977), defendant contends that the publicity prejudiced his right to a fair trial and that the trial court abused its discretion.

Defendant does not dispute the factual accuracy of the publicity. Nor does he point to anything of record to indicate that a single juror seated at trial was unable to disregard the publicity and accord him a fair trial. The burden of defendant's complaint is that the sheer volume of publicity concerning so heinous a crime, commited by a prior offender against a member of a

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[2] This paragraph of the statute was repealed by Acts 1976, c. 211, but, by the same enactment, a similar provision was incorporated in Code § 7.1-18.1 (Cum. Supp. 1978).

family prominent in the community, compels a finding of unfairness. We disagree.

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But . . . extensive knowledge in the community of either the crimes or the puntative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do . . .

Dobbert v. *Florida*, 432 U.S. 282, 303 (1977); *see also Greenfield* v. *Commonwealth*, 214 Va. 710, 716-17, 204 S.E.2d 414, 419-20 (1974).

We hold that defendant has failed to show that he could not or did not receive a fair trial in the jurisdiction in which he was convicted, and we find no abuse of judicial discretion in the trial court's ruling.

C. Exclusion of Juror

The trial court excluded Mrs. Piggott as a juror for cause related to her predispostion against capital punishment. Relevant portions of the *voir dire* are assembled at the foot of this opinion as Appendix B.

Veniremen may not constitutionally be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction", *Witherspoon* v. *Illinois*, 391 U.S. 510, 522 (1968), and exclusion of a single veniremen for such cause renders the death penalty constitutionally infirm, *Davis* v. *Georgia*, 429 U.S. 122, 123 (1976).

In support of his assignment of error to the trial court's ruling, defendant relies principally upon portions of two footnotes in *Witherspoon:*

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

391 U.S. at 516, n.9.

> The most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. . . .
>
> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . .

391 U.S. at 522, n.21.

The courts which have addressed the question do not agree what effect these two footnotes have upon the textual holding that "general objections" to capital punishment are not sufficient grounds to exclude a venireman for cause. *See* 39 ALR 3d 550 (1971). In our view, footnote 9 means that, absent an unambiguous statement of *absolute* objection, the trial judge cannot *assume* absolute objection. It does not mean that, simply because there may be some confusion and inconsistency; in the statements that were made, the trial judge is foreclosed from determining from the *voir dire* at large whether a juror would "*automatically* vote against the imposition of capital punishment".

> [E]ven though a prospective juror's *voir dire* answers to questions concerning his beliefs as to capital punishment may be equivocal and not models of clarity, it is proper for

> the trial judge to excuse the juror for cause when a contextual consideration of the entire *voir dire* examination indicates that the juror could not vote for a verdict which would result in the imposition of the death penalty.

State v. *Simmons*, 286 N.C. 681, 688-89, 213 S.E.2d 280, 286 (1975), *vacated on other grounds*, 428 U.S. 903 (1976).

While footnote 9 is merely a comment parenthetical to the *Witherspoon* Court's recitation of the proceedings in the trial court, footnote 21 is keyed to and is a corollary of the textual holding. Under the holding and corollary read together, "general objections" to capital punishment are not constitutionally sufficient to justify the exclusion of a juror for cause; nothing less than an absolute objection, *i.e.*, an irrevocable commitment to vote against the death penalty, will suffice.

Whether an exclusion is justified under the *Witherspoon* test is a mixed question of law and fact. Stated differently, the question whether the venireman should be excluded turns upon the question whether, in fact, he is "irrevocably committed". In order to apply the rule of law, the trial court must first decide the factual question. As fact-finder, the trial court must weigh the meaning of the answers given in light of the phrasing of the questions posed, the inflections, tone, and tenor of the dialogue, and the general demeanor of the prospective juror. We are aware that, while the words employed may, when transcribed and read in retrospect, appear ambivalent, the judge who heard them uttered was uniquely positioned to assess their ultimate import. Accordingly, his finding on this question of fact will not be disturbed on appeal unless, upon consideration of the *voir dire* as a whole, we can say that the venireman's commitment against the death penalty was not "unmistakably clear".

The record of the *voir dire* shows that, in response to several questions patently phrased to elicit such a response, Mrs. Piggott agreed that capital punishment might "possibly" be appropriate in some cases. At least six times, however, she stated positively, and with no ambiguity, equivocation, or res-

ervation whatsoever, that she could never, under any circumstances, vote to impose the death penalty. In reply to the last two questions put to her, she acknowledged that, if defendant should be convicted, she would vote for a "lifetime" penalty and that she was "absolutely against the death penalty".

In argument following the *voire dire*, counsel agreed that the test for exclusion was, not whether Mrs. Piggot was "against the death penalty", but rather whether she was "absolutely against the death penalty". Noting the inconsistency in some of the responses to questions phrased by respective counsel, the trial court concluded that "life is all she'd ever give" and discharged her from the jury panel. We cannot say that this finding of fact was not "unmistakably clear", and we hold that the ruling grounded upon that finding did not contravene the principles announced in *Witherspoon* and its progeny.

II. THE GUILT TRIAL

A. Reputation Evidence

[4] Rape was an essential element of the crime of capital murder charged in the indictment. Code § 18.2-31(e). "[W]here consent is advanced as a defense to a charge of rape, the previous unchaste character of the prosecutrix may be shown by proof of general reputation." *Wynne* v. *Commonwealth*, 216 Va. 355, 356, 218 S.E.2d 445, 446 (1975). The trial court refused to permit such evidence on the ground that the defense of consent had not been advanced.

As defendant says, once the defense is advanced, the issue of consent *vel non* becomes a jury question. But whether evidence relevant thereto is admissible is an evidentiary question. That issue depends upon whether the defense of consent has been advanced.

We do not agree that the defense is advanced solely by a plea of not guilty. That plea could be grounded upon defendant's belief that the Commonwelath is unable to prove identification, opportunity, or the physical elements of carnal knowledge. The

defense of consent can be "advanced" within the meaning of the rule in *Wynne* only by evidence adduced by one of the parties. Whether the evidence is sufficient for that purpose necessarily is a question of law.

Here, the only evidence relevant to that question was defendant's own account of how the crime was committed. On appeal, defendant emphasizes certain circumstances as described in his confession: he met the decedent on a deserted beach; she joined him in friendly conversation; she permitted him to remove briars from her bare feet; she walked with him to a wooded area; she removed her own clothes and a tampon; and she made no attempt to escape while he affixed a contraceptive device. In light of the absence of evidence of a struggle or "defensive wounds", defendant says, this evidence was sufficient to advance the defense of consent.

In making its determination on this question, the trial court was not confined to isolated excerpts of the confession. According to other portions of the confession, when the decedent "started to walk toward her car and said 'I'm going'", defendant put his "right arm around her waist" and told her, "come on, go with me"; she "was not too willing at first so [he] pulled on her" and, when she asked him several times "where are we going", he told her to "just keep on walking"; when they reached the wooded area, he "pulled a knife" and "told her to take her clothes off"; she then said, "please don't do this, I've got two kids at home, you don't need me"; and telling her, "I've got to have you", defendant "got on top of her and had sexual relations with her".

The absence of evidence of a struggle or defensive wounds was largely irrelevant to the question before the trial court, for a "woman is not required to resist to the utmost of her physical strength if she reasonably believes that resistance would be useless and result in serious bodily injury to her." *Barnett* v. *Commonwealth*, 216 Va. 200, 202, 217 S.E.2d 828, 830 (1975). Nowhere in his confession did defendant claim that the act of intercourse was consensual. Rather, he acknowledged that he

applied force in taking her to the wooded area, that he threatened her with a knife, and that she protested his advances. We believe the only reasonably conclusion the evidence supports is that she submitted, not out of volition, but out of a state of fear, one which, given the brutal consequences which followed, was fully justified.

We hold, therefore, that the trial court correctly ruled as a matter of law that the defense of consent had not been advanced and that the evidence defendant proffered was inadmissible.

B. Instruction on Rape

As tendered, defendant's Instruction "H" defining forcible rape required the Commonwealth to prove that the act of intercourse was accomplished "by force and violence". Code § 18.2-61 does not require the Commonwealth to prove violence. Before granting the instruction, the trial court amended the language to require proof that intercourse with the decedent was accomplished "against her will, by force". The amendment accords precisely with the statutory definition, and we find no error in the trial court's action.

C. Photographs

Defendant charges that, since photographs of the victim's body "were not necessary to identify the victim", they were merely inflammatory and, hence, inadmissible.

The admissibility of photographs is a matter within the sound discretion of the trial court. *Inge* v. *Commonwealth*, 217 Va. 360, 364, 228 S.E.2d 563, 566 (1976). There is no abuse of discretion in admitting photographs which are "relevant and material to establish premeditation and malice and to show the degree of atrociousness of the crime." *Brown* v. *Commonwealth*, 212 Va. 515, 519, 184 S.E.2d 786, 789 (1971).

We are of the opinion that the photographs depicting contusions about the victim's neck, abrasions on her back, and multiple stab wounds in her body were relevant and material

for the purposes approved in *Brown* and that they were no more inflammatory than the medical testimony detailing the results of the autopsy.

D. Testimony of Victim's Daughter

The crime occurred at "approximately 1:45 or 2:00 p.m." on May 23, 1977. Heather Weiler, the victim's young daughter, testified that she last saw her mother at 8:00 a.m. that morning. One witness saw Mrs. Weiler alive at 10:30 a.m. and another at noon. Other witnesses described events late that afternoon leading to the discovery of the victim's body and other physical evidence.

Conceding that "the admissibility of evidence is within the sound discretion of the trial court", defendant contends that, since Heather "had no personal knowledge of the offense", her testimony "served only to inflame the jury" and its admission constituted an abuse of discretion.

As we read Heather's testimony, it did nothing more than supplement the testimonial narrative of the sequence of events preceding and following the commission of the crime. Such background events, though not directly relevant to the question of guilt, are material to the fact-finder's understanding of the crucial event, and for that purpose courts allow considerable leeway in the testimonial narrative. *See* McCormick, *Evidence*, (2d ed. 1972) § 185, p. 434.

We are of opinion that Heather's testimony was not, in the due process connotation of the word, inflammatory. None of her language was inflammatory *per se*. Given the fact the jury was already aware that the decedent was the mother of two young children, it is unlikely that Heather's appearance in the courtroom was inflammatory. The record does not disclose, and defendant does not argue, that Heather's conduct or demeanor during her brief testimony was maudlin, vengeful, or otherwise emotional. Hence, giving due deference to the trial court's superior perspective of the witness and the impact of her

testimony on the jury, we cannot say that the trial court committed reversible error in allowing her testimony.

E. Competency Of Confession

(1) Miranda

Defendant and his brother Howard lived on a farm near the scene of the crime. Officer Dunford, who was aware of defendant's prior conviction of rape, and Officers Gunson and Cumbee went to the farm and asked Howard if they could talk with defendant. Defendant was not there but, in response to Howard's telephone call, arrived a short time later. Standing in a hallway just inside the front door of the Smith home, the officers questioned defendant as he sat on the short staircase leading to the kitchen. They told him they were investigating the Weiler murder and asked him if he "had done this thing". Without any foundation in fact, Dunford suggested that defendant's fingerprints and footprints had been found at the scene of the crime. Later, while Dunford was in the kitchen talking with Howard, Gunson told defendant he believed he was guilty and urged him to confess and ease his conscience. The officers testified that, during the course of the interrogation, which lasted for possibly 15 minutes, defendant made no inculpatory statements. "He sat on the step with his head bowed, looking at the floor and twirling the front of his hair with his forefingers", and, according to the officers, his only responses were, "I know you would have come to see me" and "Do you think a lawyer could help me?" At that point, Gunson held up his hand and told defendant not to say anything more. Cumbee read the *Miranda* warnings twice, asked whether defendant understood them, and defendant acknowledged that he did. Defendant then made an oral confession, showed the officers the scene of the crime, and pointed out the place he had discarded the murder knife. Later at the jail, defendant signed the written confession introduced in evidence.

Testifying solely in support of his motion to suppress, defendant said that, during the course of the initial interrogation, he

had told the police, "I'm the one." This statement, he insisted, was made only after the investigation had "focused" upon him and had become "accusatory" and before the *Miranda* warnings were given. Therefore, he contends, he was under "custodial interrogation", his inculpatory statement was inadmissible under *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and his subsequent confession and all of the evidence derived therefrom was "tainted" under the rule in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Miranda applies only where there is "custodial interrogation", *i.e.*, "questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" 384 U.S. at 444. The fact that the investigation had focused upon the suspect and had become accusatory is not determinative of the question of custody. *Jordan* v. *Commonwealth*, 216 Va. 768, 772, 222 S.E.2d 573, 577, at n.1 (1976); *cf.Beckwith* v. *United States*, 425 U.S. 341, 344-48 (1976). At the time defendant says he made the first incriminating statement, he had not been "deprived of his freedom in any significant way". He was not under arrest; no physical restraint of any kind had been imposed; and he was situated in a familiar, noncoercive enviroment which he had entered of his own accord. The trial court was not bound to believe defendant's testimony, but even if the inculpatory statement he said he made was made at the time he said, it was not the product of custodial interrogation, and we find no error in the trial court's ruling to that effect.

We see no merit in defendant's further argument that "his waiver was not voluntary because . . . statements made by the three police officers could reasonably have been interpreted as offers of psychiatric treatment." It is true that the police had discussed defendant's need for psychiatric help, but they testified unanimously and positively that no offers or promises were made, and nothing defendant said in the suppression hearing contradicted that testimony. Nor do we believe that the officers'

comments about the fingerprints and footprints overbore defendant's will and caused him to execute a waiver and make a confession he otherwise would have withheld. We conclude that defendant's waiver was voluntary and that the trial court did not err in admitting his confession.

(2) **Admission of Prior Crime**

Defendant's confession included the following exchange:

Q. Why did you kill her?

A. All I could think about was going back to the penitentiary. I was afraid she could send me back.

Evidence of defendant's prior criminal record adduced at the penalty trial was fully admissible. Code § 19.2-264.4B, C (Cum. Supp. 1977). Defendant contends, however, that the trial court should have excluded this portion of his confession at the *guilt* trial.

Generally, evidence of prior crimes is incompetent because it "confuses the issue before the jury, unfairly surprises the accused with a charge he is not prepared to meet, and tends to prejudice him in the minds of the jury". *Fleenor* v. *Commonwealth*, 200 Va. 270, 275, 105 S.E.2d 160, 163 (1958).

> There are exceptions, however, to this rule, as well established as the rule itself, and such evidence may be admitted to show motive, intent or guilty knowledge, or when it is connected with or leads up to the offense for which the accused is on trial.

Roy v. *Commonwealth*, 191 Va. 722, 726, 62 S.E.2d 902, 903 (1951).

Defendant freely admitted that his reason for killing the woman he had raped was to silence his accuser in order to avoid the consequences of his crime. We hold that his admission was fully competent to show motive, intent, and premeditation.

III. CONSTITUTIONAL CHALLENGES TO THE STATUTORY COMPLEX

A. Preface

The pertinent portions of the statutory complex under which defendant was convicted and this review was docketed appear at the foot of this opinion as Appendix A. A premeditated killing following rape is one of the crimes denominated "capital murder", a class 1 felony punishable by death or imprisonment for life. When an indictment for a class 1 felony is tried by a jury, four separate proceedings must be conducted before a sentence of death can be executed. Three evidentiary hearings must be conducted. In the first, the jury must determine the issue of guilt or innocence and may convict the defendant of the crime charged or innocence and may convict the defendant of the crime charged or a lesser-included offense. If the defendant is convicted of a class 1 felony, there must be a second trial by the same jury to determine the issue whether the penalty should be death or imprisonment for life. Bearing upon that determination, the jury may hear evidence concerning circumstances surrounding the offense, the history and background of the accused, and facts in mitigation of the offense. For illustrative purposes and not by way of limitation, five mitigating circumstances are expressly listed.

The jury may not recommend the death penalty unless the Commonwealth establishes one of two factors in aggravation of the offense. The Commonwealth must prove beyond a reasonable doubt either that there is a "probability" that the defendant would "commit criminal acts of violence that would constitute a continuing serious threat to society", or that his conduct in committing the crime was "outrageously or wantonly vile, horrible or inhuman, in that involved torture, depravity of mind or an aggravated battery to the victim." Code § 9.2-264.2. It is clear from the statutory context that, even when the Commonwealth establishes either or both aggravating circumstances, the jury is at liberty, in considera-

tion of circumstances in mitigation, to recommend a sentence of imprisonment for life.

The penalty verdict must be in writing in one of two prescribed forms—one for a life sentence and the other for a death sentence. The latter contains a recitation of a finding of either "dangerousness" or "vileness" and a statement that the jury has considered evidence in mitigation of the offense. If the jury is unable to agree upon the penalty, the trial court is required to impose a sentence of imprisonment for life.

When the jury recommends the death penalty, the trial court must direct a probation officer to investigate the history of the defendant and other relevant facts and make a report to the trial court in accordance with the provisions of Code § 19.2-299. Under that statute, a copy of the report must be made available to the defendant at least five days before it is presented in open court and the defendant is guaranteed the right to cross-examine the investigating officer and the right "to present any additional facts bearing upon the matter which he may desire to present."

At the conclusion of this third hearing, if the trial court determines that the death penalty is not "appropriate and just", it may set aside the sentence of death and impose a life sentence.

If the trial court affirms the death sentence, the defendant is entitled to an appellate review of the sentence as a matter of right, and the review is accorded priority on our docket. In the course of this fourth proceeding, this Court is directed to make two determinations, *viz.*, whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, and whether, considering similar cases, the penalty is excessive or disproportionate. Having made these determinations, this Court may affirm the death penalty or commute it to life imprisonment.

To this statuory complex, defendant poses a two-fold challenge. First, he maintains that, as applied to his case, it offends

the *ex post facto* clauses of the federal and state constitutions, U.S. Const. art. 1, § 10, and Va. Const. art. 1, § 9. Second, he contends that the statutory scheme is facially unconstitutional under the Eighth and Fourteenth Amendments.

Initially, we will summarize relevant developments in statutory and case law following the watershed decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972). *Furman* held that a statutory system which permits unbridled discretion in the process of imposing the death penalty violates the Eighth and Fourteenth Amendments. Responding to *Furman* in 1975, the General Assembly enacted new statutes eliminating sentencing discretion by making the death penalty mandatory upon conviction of selected offenses. Acts 1975, cc. 14, 15; Code §§ 18.2-1, *et seq.* (Repl. Vol. 1975).

Thereafter, in 1976 the United States Supreme Court decided five cases attacking the constitutionality of death penalty statutes. In *Roberts* v. *Louisiana*, 428 U.S. 325 (1976) and *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), mandatory death sentences were declared to be a constitutionally impermissible response to *Furman*. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court decided that *Furman* did not require that all sentencing discretion be eliminated if the statutory system provides adequate standards to guide the exercise of that discretion.

In 1977, following the pattern approved in *Jurek*, the General Assembly enacted the statutory complex *sub judice*.

B. As Applied Constitutionality

The crime at bar was committed May 23, 1977. The statutes under which defendant was convicted did not take effect until July 1, 1977. Defendant argues that *Roberts* and *Woodson* rendered the mandatory death provisions of Title 18.2 as enacted in 1975 (hereinafter, the 1975 law) "presumptively unconstitutional" and that, on the date of the crime of which he was convicted, the death penalty could not be imposed in

Virginia; that Title 18.2 as enacted in 1977 (hereinafter, the 1977 law) was not ameliorative because it increased the potential penalty; and that the application of the more onerous 1977 law to a crime committed before it became effective thus violated the *ex post facto* clauses.

Manifestly, the alternative penalty provisions of the 1977 law were less onerous than the mandatory penalty provision of the 1975 law, and we do not agree that the 1975 law was "presumptively unconstitutional" at the time this crime was committed. In *Lewis* v. *Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977), the defendant argued that *Roberts* and *Woodson* had invalidated the provisions of Code § 53-291 which prescribed a mandatory death penalty for the killing by an inmate of an employee of a prison. Noting that we had upheld the constitutionality of that statute in *Washington* v. *Commonwealth*, 216 Va. 185, 217 S.E.2d 815 (1975), and *Jefferson* v. *Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974), we held that, until we had formally adjudicated a constitutional challenge, the statute "stand[s], at least presumptively, valid and enforceable," *Lewis*, 218 Va. at 38, 235 S.E.2d at 324.

The United States Supreme Court reached a similar conclusion from a comparable predicate in *Dobbert* v. *Florida*, 432 U.S. 282 (1977). Dobbert's crimes antedated the June 22, 1972 decision in *Furman*. The month following that decision, the Florida Supreme Court held that *Furman* invalidated the State's death penalty statutes. *Donaldson* v. *Sack*, 265 So.2d 499 (Fla. 1972). Later that year, Florida enacted the new statutes under which Dobbert was convicted. Dobbert claimed that there was no "valid" death penalty "in effect" on the date of his crime and that the application of the new statutes to his case increased the penalty and violated the *ex post facto* clause. Rejecting that argument, the Court said:

> Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum de-

> terrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.

Dobbert, 432 U.S. at 297.

There can be no doubt about Virginia's historical view of the gravity of premeditated murder; the death penalty has been on our statute books since 1796. Given this ancient prologue and in light of the statute on the books on the date of the crime at bar which, as we have said, was presumptively valid and enforceable, we believe defendant had "fair warning" of the consequences of murder.

We conclude, therefore, that since the 1975 law was presumptively valid, the 1977 law was ameliorative. When the changes the subsequent law makes in the prior law are ameliorative, there is no *ex post facto* violation; the same is true when the changes, though not ameliorative, are merely procedural. *Dobbert*, 432 U.S. at 292, n.6. Clearly, the changes incorporated in the 1977 law were both ameliorative and procedural. Prompted by the teachings of *Jurek*, *Proffitt*, *Gregg*, *Roberts*, and *Woodson*, the General Assembly changed the 1975 law and established new procedures to be employed in the sentencing process to insure that the death penalty would not be imposed in an arbitrary or capricious manner. We hold, therefore, that the trial court committed no constitutional error in applying the 1977 law to defendant's case.

Aside from this constitutional challenge, defendant invokes the provisions of Code § 1-16 (Repl. Vol. 1973) which read in pertinent part:

> No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any . . . punishment incurred . . . or in any way whatever to affect any such offense or . . . punishment so incurred . . . save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. . . .

Citing *Ferguson* v. *Ferguson*, 169 Va. 77, 192 S.E. 774 (1937), defendant argues that, absent an expression of legislative intent to the contrary, all new statutes must be applied prospectively only. While it is true that the 1977 law is silent on the question, § 1-16 itself expressly provides that "proceedings" under a new statute "shall conform, so far as practicable, to the laws in force at the time of such proceedings." We construe this language to mean that procedural provisions of the statute in effect on the date of trial control the conduct of trial insofar as practicable. Defendant's trial was conducted in strict compliance with the new procedures in effect on the date of his trial, and we find no merit in his argument.[3]

C. Facial Constitutionality

Defendant maintains that the 1977 law is facially unconstitutional under the Eighth and Fourteenth Amendments. He argues that the death penalty *per se* constitutes cruel and unusual punishment. Observing that *Furman*, *Roberts*, and Woodson interpreted the Eighth and Fourteenth Amendments to prohibit statutory schemes which vest "unbridled discretion" in the sentencing authority, he also argues that the Virginia statutes vest such discretion in the Commonwealth's Attorney; he reasons that, absent statutory standards to guide the prosecutor in selecting which defendants will be prosecuted for a capital offense and which for a non-capital offense, the 1977 law is facially arbitrary and capricious.

Both of these arguments were considered and rejected by the plurality of the United States Supreme Court in *Jurek*, *Proffitt*, and *Gregg* and by this Court in *Washington* v. *Com-*

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[3] On brief, defendant also argues that, as applied to a male, Code § 18.2-61 (Repl. Vol. 1975), which defines rape (one of the elements of the instant crime) as carnal knowledge of a female against her will and by force, constitutes a denial of equal protection of the laws. This question was not raised below, it was not the subject of an assignment of error, and it was not argued at bar. It will not, therefore, be noticed here. Rule 5:21.

monwealth, *supra*, and *Jefferson* v. *Commonwealth*, *supra*. For the reasons stated there, we decline defendant's invitation to disregard these precedents.

We are not persuaded by the contention that the statutory definitions of the two aggravating circumstances (see Appendix A) are so vague as to vest the sentencing authority with standardless sentencing power.

The language defining the first aggravating circumstance, *i.e.*, the potential "dangerousness" of the defendant, is identical to that in the Texas statute upheld in *Jurek*. Rejecting a vagueness challenge to that language, the *Jurek* court said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same, predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. [footnotes omitted].

428 U.S. at 274-76.

To establish "dangerousness" the Commonwealth must prove beyond a reasonable doubt that there is a "probability" that the defendant would commit "criminal acts of violence" such as would pose a "continuing serious threat to society." We see no constitutional vagueness in that language.

In our view, it is designed to focus the fact-finder's attention on prior criminal conduct as the principal predicate for a predic-

tion of future "dangerousness."[4] If the defendant has been previously convicted of "criminal acts of violence," *i.e.*, serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability," *i.e.*, a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat."

It also appears that the language defining the second aggravating circumstance, *i.e.*, the "vileness" of the defendant's conduct in committing the crime, is the same as that in the Georgia statute upheld in *Gregg*. Since any act of murder arguably involves a "depravity of mind" and an "aggravated battery to the victim," it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance. We regard such a construction as strained, unnatural, and manifestly contrary to legislative intent. The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class.

Hence, we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. *See Harris* v. *State*, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S.

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[4] It should be noted that, while prior criminal conduct is the *principal* predicate, the statute provides a further predicate, *viz.*, "the circumstances surrounding the commission of the offense of which [the defendant] is accused."

933 (1977).[5] It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman."

We note in passing that the Virginia statute contains a constitutional safeguard not explicitly articulated in the Texas statute. The 1977 law provides a list of mitigating circumstances which the fact-finder is required to consider *in pari materia* with aggravating circumstances. The list is illustrative and not exclusive; the statute expressly provides that facts in mitigation "may include, but shall not be limited to" the items codified, and that evidence may be adduced to show "any other facts in mitigation of the offense."[6] Code § 19.2-264.4B. Although the Texas statute was silent in this respect, it was found to be constitutionally sufficient on the grounds that the Texas Court of Criminal Appeals had "indicated that it will interpret . . . [the statute] so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." *Jurek*, 428 U.S. at 272.

IV. THE PENALTY TRIAL

A. Commonwealth's Instruction "1"

Defendant challenges Commonwealth's Instruction "1" because, he says, it fails to advise the jury that, even though it

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[5] *See also* Florida's construction of other language defining a similar aggravating circumstance in *State* v. *Dixon*, 283 So.2d 1, 9 (Fla. 1973), cited with approval in *Proffitt*, 428 U.S. at 255.

[6] These provisions are clearly in accord with the mandate of *Roberts* and *Woodson* as interpreted in *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) where Chief Justice Burger for the Court states:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [footnotes omitted].

may find aggravating circumstances, the death penalty is not mandatory.

Code § 19.2-264.4C provides that the death penalty shall not be imposed unless the Commonwealth proves one of the two aggravating circumstances beyond a reasonable doubt. The statute does not require that, upon such proof, the jury *must* impose the extreme penalty but only that, absent such proof, it shall *not* do so. By requiring the jury to consider circumstances both in aggravation of and in mitigation of the offense, the statute clearly contemplates that, notwithstanding a showing of the former, the jury is at liberty in consideration of the latter to recommend the lesser penalty. Such discretion in the sentencing authority is not constitutionally infirm. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[7] *Gregg*, 428 U.S. at 199.

We agree that the instruction was not artfully drawn. Yet, we are of opinion that, read as a whole, it fairly expounds the thrust of the statute. Reciting the statutory command that the death penalty "shall not be imposed" absent a showing of aggravating circumstances, the instruction told the jury that it "may fix . . . punishment at death." What a jury "may" do it is at liberty not to do.

B. Rebuttal Argument By Commonwealth

Defendant maintains that the trial court erred in permitting the Commonwealth to make a closing rebuttal during the penalty trial. That procedure, he says, "places undue emphasis on the aggravating circumstances."

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[7] We reject the thesis that, because the statutory alternative to the capital penalty is one which permits parole, the sentencing authority is constitutionally overbroad. Surely, mercy by parole is not unconstitutional.

The argument defendant makes was upheld in *People* v. *Bandhauer*, 66 Cal.2d 524, 530-31; 58 Cal. Rptr. 332, 336-37; 426 P.2d 900, 904-05, *cert. denied*, 389 U.S. 878 (1967), under the following rationale:

> The prosecutor's burden of proving guilt beyond a reasonable doubt at the trial on the issue of guilt justifies his closing the argument as well as opening it. At the trial on the issue of penalty, however, neither side has the burden of proving that one or the other penalty is the proper one in the case at hand, and there is no logical reason to favor one side over the other in argument.

But, as we have just noted, Code § 19.2-264.4C places upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt. For more than a century, the rule in Virginia has been that "the party having the affirmative of the issue has the right to open and conclude the argument before the jury." *Doss* v. *Commonwealth*, 42 Va. (1 Gratt.) 557, 560-61 (1844). In light of the statutory command, we decline to change the rule here.

V. PROPRIETY OF THE SENTENCE

A. Product Of Passion

Defendant urges us to commute the death sentence to imprisonment for life. The sentence, he says, was the product of "passion, prejudice, or other arbitrary factors." He reasserts his arguments that the photographs of the victim's body and the testimony of her daughter inflamed the passions of the jury. The same was true, he contends, of the repetitious reading of his confession, once during opening argument, once during the evidentiary portion of the guilt trial, and once during the penalty trial.

At the penalty trial, the Commonwealth introduced evidence, *inter alia*, that defendant had been previously convicted of an earlier crime of forcible rape and psychiatric testimony concerning the possibility that he might commit future crimes of violence. Confining himself to cross-examination of the Commonwealth's witnesses, defendant offered no

independent evidence of circumstances in mitigation of the offense. In argument, the only mitigating factors stressed were defendant's good behavior during incarceration, the prospect of rehabilitation, and the probability that, if sentenced to prison for life, defendant "would be in his sixties before he would even be eligible for parole." The written verdict recited a finding of both aggravating circumstances. Although the jury was told that it might yet impose the lesser penalty, it unanimously recommended a penalty of death. Based upon its consideration of "all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant," the trial court entered final judgment confirming the penalty recommended by the jury.

We assume that the jurors were aroused by all they had heard and seen concerning conduct which they found to be "outrageously or wantonly vile, horrible or inhuman." And no doubt they were moved by the plight of a young daughter in the loss of her mother. Yet, we cannot say that, absent the trial incidents of which defendant complains, the jurors would have been less so or that they would have recommended a different penalty.

We are, therefore, of opinion that the sentence imposed was not the product of invidious passion, prejudice, or other arbitrary factors but the product of a reasoned judgment grounded in the evidence and in accord with the law.

B. Excessiveness

This Court is directed to determine whether the penalty imposed is "excessive or disproportionate to the penalty imposed in similar cases," and, in aid of that determination, we are empowered to "accumulate the records of all capital felony cases tried within such period of time as the court may determine."[8] Code § 17-110.1E (Cum. Supp. 1978).

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[8] Pursuant to Code § 17-110.1E, we have this day entered an order

On brief, defendant addresses this question in only two sentences. Although "there have been convictions for rape-murder in Virginia in recent years," he says, "no defendant has been subjected to the death penalty in Virginia in almost sixteen years."

Manifestly, since this is the first case to be reviewed under the 1977 law, no records of cases involving the particular crime charged in the indictment are available for comparison with the record here. Capital cases tried and reviewed under prior laws involved offenses definitionally different from the one at bar. Among a host of such cases, defendant cites none he considers fairly comparable to his case. Our own research has disclosed none in which a penalty less than death was imposed. On the other hand, we find that, of the 236 persons actually executed in the last seven decades, 232 had been convicted of murder or rape or murder in connection with rape. These figures do not, of course, include cases in which a death penalty initially imposed was set aside by the courts or commuted by executive clemency.

In consideration of the record as a whole and to the extent we can make a meaningful comparison with other capital cases decided in this Commonwealth, we hold that the penalty imposed in this case was not excessive or disproportionate. Finding no reversible error in the court below, we will affirm the verdict of guilty and the sentence of death.

Affirmed.

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directing the Clerk of this Court henceforth to segregate and accumulate the printed records and opinions in all class 1 felony cases, to maintain a current index of those cases, and to make the index, records, and opinions of this Court available for examination upon the request of any court of record in the Commonwealth or in the federal jurisdiction.

APPENDIX A

The Statutory Complex (Cum. Supp. 1977)

§ 18.2-10. Punishment for conviction of felony.—The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

* * * *

§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a Class I felony:

. . . .

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape . . . .

* * * *

§ 19.2-264.2 Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

* * * *

§ 19.2-264.3. Procedure for trial by jury.—A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

* * * *

§ 19.2-264.4 Sentence proceeding.—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while

the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____ foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the

offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____foreman"

(E) In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

* * * *

§ 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

* * * *

§ 17-110.1. Review of death sentence.—A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death; or

2. Commute the sentence of death to imprisonment for life.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.

§ 17-110.2. Priority given to such review.—The Supreme Court shall, in setting its docket, give priority to the review of cases in which the sentence of death has been imposed over other cases pending in the Court.

APPENDIX B

Voir Dire Of Mrs. Piggott

[BY MR. PERSON, COMMONWEALTH'S ATTORNEY]

Q. And do you understand in the first hearing that the jury will determine guilt or innocence of the Defendant?

A. Right.

Q. And do you understand that in the second hearing, the second part of this trial, that the jury, if they find the Defendant guilty of capital murder, will be asked to fix his punishment at life imprisonment or death?

A. Yes.

. . . .

Q. Now, do you have any religious or moral or conscientious scruples against giving somebody the death penalty in the proper case?

A. I would say yes.

Q. Yes. You couldn't give anybody the death penalty, could you?

A. No.

Q. All right. And in fact, no matter what the facts were in the case, you couldn't put somebody to death, could you?

A. No.

Q. Nor could you vote for somebody to die, could you?

A. No.

Q. All right. So you are absolutely against the death penalty, is that correct?

A. I think so.

. . . .

[BY MR. WOOD, COUNSEL FOR DEFENDANT]

Q. All right. Now, would the fact that you had to vote first of all on guilt or innocence initially, now before any sentence were imposed, what I am talking about just voting on one thing, that's guilt or innocence of the accused, would the fact that the person could either get life or death, would that influence you decision at all in voting for guilt or innocence?

A. No.

Q. It wouldn't influence you, is that correct?

A. It would not.

. . . .

Q. Would the view that you hold about capital punishment compel you automatically solely on those views, would they compel you to vote not for the death penalty, or could you possibly vote for the death penalty?

A. Well, could you make that a little plainer. I didn't understand that too good.

Q. Okay. I assume from your answers, answering Mr. Person's questions, that you're somewhat opposed to the death sentence, is that correct?

A. Right.

Q. In the State of Virginia. All right. Would the views that you hold, that is your own personal feelings about the death penalty, would they compel you solely because of the views you hold about the death penalty, would they compel you, would that in other words, force you to vote for the death penalty, or could you possibly vote for the death penalty in a certain case depending on what the facts were, depending on what the evidence is in that particular case?

A. I guess I possibly could then, I guess. I don't know.

Q. Depending on what the facts are in any particular case, is that correct?

A. Yes.

[BY MR. PERSON:]

Q. Mrs. Piggott, you understand now, and excuse me if I repeat myself because it's very important to get your answers correctly because this is the time when you can—you as a person can tell Judge Carneal that you don't agree with the law; that you don't agree with the death penalty in this case, no matter what the case is, that you don't agree with it and nothing will happen to you. This is one time you can do that and you can tell Judge Carneal that you don't agree with the death sentence under any circumstances because you just don't feel it's right, and nothing will happen. Now, is that the way you feel?

A. No, not exactly. But—I don't know. I don't like—you know—to hear of that but I guess something have to be done if you're wrong, I guess.

Q. Let me ask you this. To make myself perfectly clear, you understand that the first trial will be—the jury will determine whether the defendant is guilty or innocent, is that correct?

A. Right.

Q. Now, knowing that the Defendant might be given death, could you if the Commonwealth proves its case beyond a reasonable doubt and if it was a proper case, could you find the Defendant guilty, knowing that he might be given death later on, or would you have to find him not guilty?

A. Well, I guess if he's guilty, I'll have to.

Q. You could find him guilty, is that correct?

A. Yes.

Q. Now, once you found him guilty, there would be only two punishments.

A. Yes.

Q. One would be life imprisonment and the other would be death. All right.

A. Yes.

Q. Now, if the Commonwealth proves its case beyond a reasonable doubt and it was a proper case, could you vote the death penalty for the Defendant?

A. I—

Q. Or would you have to give him life imprisonment?

A. I would say life.

Q. Life. All right. So no matter what—in the second half of the trial, after you found him guilty, in the second half of the trial, no matter what the Commonwealth evidence showed, and no matter what the law told you, you couldn't give a person death, is that correct? You'd have to give him life, is that correct?

A. Yes.

Q. So you are absolutely against the death penalty, is that correct?

A. Right.

Q. In any situation?

A. No.

Q. Is that correct?

A. Right.

[BY MR. WOOD:]

Q. Mrs. Piggott, you answered some questions for me before here, is that right?

A. Yes.

Q. Didn't you answer at that time that—when I asked you a question about whether or not you possibly could impose the

death sentence in some case, depending on the facts of that case?

A. Yes.

Q. That in fact you said you possibly could, is that correct?

A. Yes.

Q. Is that the way you feel, possibly you could. You wouldn't want to, but—but you possibly could?

A. Yes.

Q. So that your feelings are not absolute, is that correct?

A. Yes.

Q. So that your feelings are not absolute, is that correct?

A. Yes.

Q. That's correct?

A. Yes.

Q. You're not saying to Mr. Person and to the Judge that I don't care what kind of case it is, or how bad the case is, I absolutely could not impose it. You're saying you possibly could, is that correct?

A. Yes.

. . . .

[BY MR. PERSON:]

Q. So you are saying no matter how difficult if might be and no matter how painful it might be, and no matter who might criticize you, that under certain facts and under certain circumstances, that you could in a proper case, if the Commonwealth proved its case beyond a reasonable doubt, and this is when you have the choice between life imprisonment and death—

A. Yes.

Q. Under those situations you could vote that the Defendant would get the death penalty, is that correct?

A. I though I said lifetime.

Q. So you're absolutely against the death penalty, is that correct?

A. Yes.

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

DR. W. J. PILE—DIRECT

* * * *

[14] Q. The order of September 28, of this Court, directing you to examine Michael Marnell Smith is in the record, but to—be sure that you're familiar with the order, I'll show it to you now. This is the order of September 28. Do you recall receiving that order?

A. I do.

Q. Did you have any conversations with either of Michael Marnell Smith's attorneys before receiving this order?

A. I do not recall any conversation.

Q. Before conducting the examination, pursuant to this order, did you have access to or review any materials related to Michael Marnell Smith's case?

A. I did not.

Q. Specifically, am I to assume that you did not have any of the records or reports prepared by the staff at Central State Hospital in a previous evaluation?

A. I did not.

Q. Did you have access at that time to, [15] before the time that you conducted the examination, to Michael Marnell Smith's confession in this case?

A. I did not.

Q. Did you have access to any materials concerning his prior criminal record?

A. No.

Q. Did anyone on your staff conduct a social history intake interview with Michael Marnell Smith before you saw him?

A. No.

Q. Did anyone on your staff, before or after you saw him, conduct any psychological testing?

A. No.

Q. In the course of your own evaluation, did you or anyone else speak, in connection with your evaluation, to any member of his family or any other person aside from the Defendant himself?

A. No, the Defendant was brought in from the jail handcuffed. No member of the family came with him.

Q. At the time that he was brought to your office, and again for the record, I believe that was on October 1st, 1977, that's in the record.

A. Yes.

Q. What did you advise Michael Marnell [16] Smith regarding the purpose of the examination?

A. No advice was given.

Q. How did you describe to him the reason why he was being brought to your office?

A. I think it was understood he was there for an examination of his sanity.

Q. Do you recall specifically what you might have said to him at that time?

A. I do not.

Q. Did you make any, do you recall making any statements to him advising him as to the uses of any disclosures that he made to you concerning the circumstances of his offense or any prior criminal conduct?

A. No.

MR. BONNIE: Excuse me.

BY MR. BONNIE:

Q. Specifically, did you advise Michael Marnell Smith before or during the examination that any statements made during the examination could be used against him by the prosecution at either the guilt or sentencing phases of his capital murder trial.

A. No.

Q. Did you specifically advise him before or during your examination that he had a right to consult with his counsel or to have counsel present during the [17] examination?

A. No.

Q. Did you specifically advise him before or during the examination that he had a right to remain silent, concerning the circumstances of the offenses, with which he had been charged, or any prior criminal offenses?

A. No.

Q. Did you specifically advise him before or during your examination that he had a right to terminate the interview at any time?

A. No.

* * * *

[21] Q. For how long would you estimate that you interviewed Michael Marnell Smith on that day in October, October 1st, 1977?

A. About an hour.

Q. About an hour. No more than an hour?

A. No.

Q. Did Michael Smith's attorneys, before or after the examination, direct your attention specifically to the issues, which can arise in a capital sentencing trial in Virginia, which I would, for the purposes of the record, like to quote, whether the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance, or whether at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as significantly impaired or, finally, whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing serious threat to society? Did either of Michael [22] Smith's attorneys ever bring those issues directly to your attention before or after your examination?

A. No.

Q. Did you ever yourself consult these statutory provisions that I have just read?

A. No.

Q. Were they ever brought to your attention by anyone?

A. No.

Q. Whom did you notify of your conclusions during the—that you derived during the course of your evaluation, and by what means?

A. I wrote a letter to Judge Carneal, with carbon copies to Mr. Person and Mr. Pugh.

Q. Did you have any subsequent conversations after the time that this report was sent with either of Michael Smith's attorneys?

A. No. However, while I was out of the country, Mr. Pugh wrote to me and my associate answered him concerning the diagnosis and some questions Mr. Pugh had asked about the diagnosis that I rendered, which my associate, Doctor Cox,

and I think that letter may be in evidence as well.

* * * *

DR. W. J. PILE — CROSS

[26] Q. At the time that you had this examination with Mr. Smith, did you question him concerning any instances of his behavior of sexual nature other than the matter for which he was presently sent to you for examination?

A. I did.

Q. And did he respond to you at that time with any information about prior circumstances?

A. He did.

Q. Did he advise you, and I think your letter of October the 1st indicates, and you have a copy of that in front of you?

A. I do.

Q. In the first paragraph, about the fourth sentence from the bottom, says, "The client was asked if he had ever raped anybody before that episode, and he said that his lawyer told him not to talk about [27] that." Did Mr. Smith tell you—advise you that his lawyer had told him not to discuss instances which were not related to the present crime?

A. He did.

Q. Thereafter, did you request from Mr. Smith any further information concerning any instances which were not connected with the present offense?

A. No.

Q. Did he thereafter voluntarily give you information concerning an offense?

A. He did.

* * * *

[31] Q. You testified, Doctor Pile, that no one brought to your attention any of the requirements, which were read to you a moment ago, and just for the record, it's under Section 19.2-264.4 of the Code of Virginia. Those being that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Nobody brought that to your attention, as I understand it.

A. No, that's correct.

Q. During the course of your investigation, or your interview and study of this young man, were you in a position, had you been asked, to have given that opinion whether the offense was committed while Mr. Smith was under the influence of extreme mental or emotional disturbance?

A. I could have given an opinion, yes.

[32] Q. And what would that opinion have been?

A. That he knew what he was doing and was aware of what was happening.

Q. And do I understand that you found no evidence that he was suffering from any influence of extreme mental or emotional disturbance?

A. That is correct.

Q. Now, there was also, I understand, not brought to your attention that during the commission of the felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. I understand no one brought that to your attention.

A. Yes.

Q. During the course of your evaluation, of this Mr. Smith, did you or were you able to have made an opinion as to whether his conduct, whether he was able to appreciate the criminality of his conduct and conform his conduct to the requirements of the law? Whether or not it was significantly impaired?

A. I felt he could.

Q. Had somebody asked you, you could have rendered an opinion on that element?

A. I could have.

Q. And what would that opinion have been?

[33] A. That he was competent, that he understood what was happening, and that he knew full well what his actions were and the results thereof.

Q. Now, you were also asked whether anybody brought to your attention whether the accused would commit criminal acts of violence that would constitute a continuing serious threat to society. No one asked you that, did they?

A. I don't believe so, no.

Q. You were not even asked that during the trial, were you?

A. I don't believe so.

Q. You were also asked, Doctor Pile, whether you gave Mr. Smith any advice or any warnings that he could remain silent or that he could consult with his attorney, and you answered that you did not. Can you explain to us any reason why you did not give any such advice?

A. The purpose of the examination was to establish his insanity and the—when I do an examination, I do it cold, and frequently don't know anything about the person or what's happened to them. And no one advised me that I was supposed to or that he was entitled to this information, so I never—it never occured to me. I never asked anyone that question. I just examine [34] them and give my opinion. In order to do that, I, of course, need them to be truthful.

* * * *

[36] REDRECT EXAMINATION

BY MR. BONNIE:

Q. Doctor Pile, I'd like to go back to the question of experience that Mr. Culp covered that you have had in forensic evaluation. You mentioned that you have very frequently done competency to stand trial evaluations?

A. Yes.

Q. And that you have also, I think you said, frequently done sanity at the time of an offense evaluation. Ordinarily in connection with sanity at the time, on whose referral do you conduct those evaluations?

A. The referral from the defense lawyers.

Q. Customarily from the defense in your normal practice?

A. Right.

Q. Was this case unusual in the sense that the Court, the order was issued by the Court, and that the report was sent to the Court rather than the defense attorney?

A. Yes.

Q. This was unusual?

A. Yes.

[37] Q. Also—

A. It was not—let me clarify that, if I may. Usually when defense attorneys ask me to see patients, clients who are in jail, it is a matter of finances, and so they put in the order for an opinion, and in which the State then, I think, pays the bill. And the State has a certain money, I guess, allocated for that, and the report always go to the defense, go to the judge, and goes to the prosecuting attorney. So in that case, I assume this was the reason why it was referred this man to me.

Q. All right, let me be very explicit about these points.

A. All right.

Q. In your general practice, as you review your experience in the past, do a—a majority or substantial portion of your

referrals come from attorneys who are representing defendants who are not indigent?

A. No, the majority that I have seen recently have been indigent patients.

Q. Recently. With regard—

A. For the last two years.

Q. Over the last two years?

A. Yes, I have been in practice twenty-five years.

[38] Q. Right. When you referred earlier to the—your practice in conducting sanity evaluations and competency to stand trial evaluations, you were referring, I presume, to the overall course of your professional career?

A. That's correct.

Q. In that contention, have most of your referrals been from the defendants who, excuse me, from attorneys who are representing defendants who are not indigent?

A. Yes.

* * * *

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

[76] DR. C. R. SHOWALTER—DIRECT

* * * *

Q. In your experience under the capital sentencing procedure in Virginia, over the last two years, what has been the ordinary and customary practice of attorneys in capital cases with regard to the degree of specificity in a—in the Court order directing you or the clinic to perform these evaluations?

A. These Court orders have been, again as I recall, rather specific. They have, as you might expect, addressed the entire gamut of potential psychiatric psychological disfunction. We read the statute to give broader base for psychiatric input at the sentencing phase than say would be the case if we were purely attempting to throw some light of the mental state at the time of [77] the offense or competency, but the whole spectrum, latitude was given for the full spectrum of the evaluation in the Court orders.

Q. Specifically, has it been the customary practice in the Court orders to specify the clinic or you, on behalf of the clinic, should evaluate a defendant for the purpose of determining, and I quote, "that—whether or not the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or whether or not at the time of the commission of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired"?

A. These were the basic questions.

Q. And these are typically specified?

A. In the Court order, yes sir.

* * * *

[78] Q. Remaining close to the facts about which you have personal knowledge, has it been typical that the attorneys have spelled out in the Court orders that the reports would be sent only to the defense attorneys?

A. This has been spelled out in our experience.

Q. Has it also been customary to include in the—Court orders statements concerning whether any statements made by the defendant, which have an incriminating nature, can be used against the defendant by the prosecution?

A. In these Court orders, it has been clearly established that the—we will warn or inform the client as to the potential uses of the evaluation; i.e., [79] what is this examination actually for. In the case—these capital—evaluations of mental state for people convicted of capital offenses, are somewhat different. Contrasting it just for a moment with the insanity defense, this is usually raised by the defendant himself or herself, the assumption being that if an insanity, some issue relevant—to making a case for an insanity defense is established, that the psychiatrist will testify in behalf of the client or defendant. In this respect.

It is somewhat different, however, in the capital sentencing evaluation, unless this is very carefully spelled out in the Court order. Because, and—and to that end, we inform the client that we may be called upon to give input at the sentencing proceeding, and then it becomes a matter for the client or the client and his attorney to draw the appropriate lines from that point.

Q. Typically, then, you advise the client that the use to which the report will be put or any disclosures that will be made will be in the hands of his attorney?

A. That is correct.

Q. Is it possible, in your opinion, from a clinical standpoint, to render an informed expert opinion regarding a defendant's mental state at the time time [80] of an offense, if the defendant refuses to discuss the circumstances of the offense with you?

A. There is now way that I can do this.

Q. Is it possible, from a clinical standpoint, in your opinion, to render an informed expert opinion regarding an offender's future behavior, specifically his amenability to rehabilitation or his likelihood for recidivism if he refuses to discuss his prior criminal conduct with you?

A. No.

Q. It is not possible?

A. It is not possible.

* * * *

[92] Q. In your opinion, is a—psychiatric interview, which is limited to one hour interview, without the benefit of formal social history or formal psychological testing, which involves discussions only with the client, and with no one else, an adequate basis or is it likely to be an adequate basis, in your own professional opinion, for diagnosing that person as an antisocial personality, or in terms that are otherwise used, a sociopath?

A. I do not think so, and the reason I say this is because—in any way I can figure this out myself, it would be virtually impossible to cover all of the necessary points, as I have previously outlined here this morning. It is a physical impossibility or temporal impossibility in getting all this material in, in the course of—one hour, plus or minus a few minutes.

Q. Could you describe, based on your [93] own knowledge about the diagnosis of sociopathy or anti-social personality disorder, what the formal requirements in order to support such a diagnosis, clinically, would be?

A. Again, as mentioned earlier, the historical components of the psychiatric evaluation are extremely important. These historical components must be elicited, in my opinion, by the clinician. It's also very important to have this historical documentation corroborated through the social history that, hopefully, has been taken and recorded previous to the psychiatric evaluation. One must inquire very carefully about the family relationships; one must inquire very carefully about school record, both academically and socially.

In fact, when evaluating an individual, in which there appears to be a consideration of a diagnosis of sociopathic personality, the clinician should examine the client with the basic ideologic genetic factors in mind; i.e. what are the factors as we understand it today that give rise to—the so-called antisocial personality or sociopathic personality disturbance. And I'll not go through the entire cataloging here but to mention a few.

Number of studies indicate that early parental deprivation is extremely frequent and significant factor of later sociopathic disturbance. [94] Inconsistent parenting, one parent standing for one thing and one parent standing for something else, the youngster growing up in the vortex of dissension of experiencing the dissension of this clash of opinions on the part of—of parents. The person who is moving toward these types of personality deterioration will evidence early in life the likelihood of significant interpersonal disturbances.

The Diagnostic and Statistical Manual Number III, which is—I suppose, at the moment in press, but speaking from the draft, of this, with respect to these diagnoses, and I might add that the sociopathic personality disturbance is one of the diagnoses that the Committee on Nomenclature of the APA has really honed in on as far as refining and crystallizing as much as possible the diagnosic ingredients, shall we say. The new construction of this diagnosis will insist that significant aberrations in interpersonal relationships were clearly in evidence

prior to the age of fifteen, to give but one example of a long catalogue that I'll not go further into at the moment.

Q. Is it accurate to characterize the—the approach of the Diagnostic and Statistical Manual Number III, that you have been quoting, as being more objective in character—

A. This is the intent in mind.

[95] Q. Than the present?

A. This is the intent of this—elaboration of diagnostic criteria.

Q. The notion that this is a draft of a new Diagnostic and Statistical Manual may imply that this is a—a change in approach within the profession. Would you regard this as a change in approach or merely a codification or statement of what has been the standard approach within the field of forensic psychiatry?

A. No, I would say it—this reflects a change in approach. I think the diagnosis of sociopathic personality disturbance, which admittedly is somewhat diffuse in the Diagnostic and Statistical Manual Number II, has been all problematic for all clinicians, and more problematic for forensic psychiatrists who work a good bit in forensic settings. And the—again, the Committee on Nomenclature and Diagnosis has addressed this issue specifically, I think, arising out of the considerable frustration with this diffuseness and impreciseness of the diagnosis.

Q. Picking up the very point, based on your understanding of the standards generally accepted within the field of forensic psychiatry, based on your understanding of the literature, the history of the Diagnostic and Statistical Manual revision and presentations [96] at scientific meetings, would it be consistent with these generally accepted standards, nationally, to diagnose a person as an antisocial personality or a sociopath after having interviewed the defendant only for a one hour period on

a single occasion, without repeating all of the other assumptions I have been making?

A. I simply do not see how this is possible.

Q. This is not possible?

A. There is not enough minutes in an hour.

Q. And not consistent with standards generally accepted within the field?

A. That's correct.

* * * *

[114] Dr. C. R. SHOWALTER—CROSS

Q. I'll rephrase the question, Doctor Showalter. You indicated that the new definition, if that's what I might call it, about sociopath indicates that he has to have certain traits prior to fifteen. And what traits are we talking about?

A. That was—your question certainly, second rephrasing of the question clarifies that point, because it can be any type of trait that would be the antecedent of anything that could become antisocial at some point later on in the life of the person.

Q. Now, are you saying that if a person has not exhibited any antisocial traits prior to fifteen, that under no circumstances a psychiatrist could find and diagnose that he is a sociopath?

A. Well, that—illustrates precisely the difficulty that one can get in, in diagnostic issues. You cannot deal—you cannot single one specific thing out, isolate it unto itself, and say that that has definitive or can—you can't ascribe to it definitive weight for diagnostic purposes.

Q. Isn't that what you did, Doctor Showalter?

A. No sir.

Q. Didn't they ask you to read the last sentence, and you said that based on that, that you [115] could not have made a finding that he was a sociopath?

A. I—lifted this one sentence out as illustrative, Mr. Culp, of one facet of the problem in making the diagnosis of sociopathic personality or antisociopathic personality disorders.

Q. Do I understand you correctly, even though a person may have exhibited no antisocial traits prior to reaching the age fifteen, that that does not mean that a psychiatrist could not diagnose him as a sociopath?

A. Under DSM-III, if you would like me to read the whole categorization, I'll be happy to do that, but certain tendencies have to be at least in evidence in a rudimentary fashion prior to age fifteen.

Q. All right, let's see if we can't get to the answer yes or no, Doctor. Right now, you've already read into the record what the new scheme definition is.

A. Part of it.

Q. All right, are you saying, and I think you can answer this yes or no, Doctor, and if you want to explain later, that would be all right. Are you saying that under no circumstances that a person who has exhibited no antisocial traits prior to fifteen, can never ever be diagnosed a sociopath, either yes or no?

A. There is no yes or no answer, Mr. Culp.

* * * *

[118] Q. Now, you talked about having this clinical thing up at Charlottesville, and that you have been involved in five capital cases in Virginia since the new law.

A. That is correct.

Q. When were you involved in the first case?

A. I can't give you a specific date. I would—as I recall, though, at what—

Q. If you can give me the name, maybe I'll help you out.

A. The Johnson case, I think, was the first one.

Q. Okay, there were, I think, at least three cases prior to Johnson case. Are you familiar with them?

A. I can't—

Q. The Smith case, Alton Way case—

A. Yes.

Q. And Morris O'Dell Mason from Eastern Shore, are you familiar with that case?

A. I know those cases by name.

Q. All those cases had been tried prior to the time you got involved?

[119] A. Yes.

Q. So do you have any idea what the date that was, what year we're talking about?

A. The Johnson case?

Q. Yes.

A. I think the evaluation took place last summer, as I recall, Mr. Culp. June, July.

Q. Now, as part of this forensic psychiatry, you keep you with the law, do you, as to how it applies in criminal cases?

A. Our institute does.

Q. Well, do you do that?

A. Thats not my major function.

Q. Well, are you familiar with some of the cases?

A. Somewhat familiar, I might say.

Q. What about the case of Smith versus Estel, that was decided by the District Court in Texas, in March, 1978, are you familiar with that?

A. Yes sir, yes sir.

Q. In that case, it's where they raised all those allegations about psychiatric evaluation on dangerousness, didn't they?

A. Yes sir.

Q. And in that case, isn't it true that [120] the judge set aside the death penalty of the Texas Court based on several of the things that you have testified to today, such as the defendant had not been given his rights to remain silent? You testified to that.

A. Yes.

Q. Such as the defendant had not been given a warning as to—that it might be used against him. That he might remain silent.

A. Yes sir.

Q. That he had a right to an attorney.

A. Yes sir.

Q. All those things came out in the Estel case in 1978, didn't it?

A. Yes sir.

Q. All right. Now, you started getting involved last summer?

A. If that was the date of the Johnson case.

Q. All right. I mean I don't know the date of the Johnson case myself, but I mean we're talking about relative dates now. I'm not saying whether was June 1st.

A. Okay.

Q. In the cases that you have worked in, the five cases, haven't the defense attorneys come to see [121] you or somebody approached you about having those five defendants examined in your clinic?

A. Yes sir.

Q. Did you not discuss with them what should be put in the Court order?

A. I think we had a conversation on that.

Q. And, of course, you asked them to put in there that the record should go to the defendant, right?

A. Yes sir.

Q. You asked them to put in there that you should evaluate these two matters that are set out in 19.2-264.4, didn't you?

A. Yes.

Q. You also asked them to set out in there whether you—I assume, whether you should make any determination of dangerousness?

A. Yes sir.

Q. Did you also have them set out in the order that they have—they should advise or the doctor or the physician yourself should advise the patient that he has a right to remain silent?

A. Yes sir.

Q. All of that, didn't that, Doctor Showalter, come from this Estel versus Smith case, or Smith [122] versus Estel, which is found in 445 Federal Supplement 647?

A. I did not construct the Court orders, Mr. Culp, so I cannot answer that question.

Q. Didn't you talk to the attorneys about what to put in there, based on what was in this case?

A. Not necessarily based on what was in that case, no sir.

Q. But there's no question that's what is in this case, isn't it?

A. Yes, I've read them, certainly.

Q. So, in other words, when you say that the attorneys, with whom you have worked, that they normally have these things put in the order, is because you told them to put it in, isn't it?

A. We consult with the attorneys prior to the evaluation, Mr. Culp.

COURT: I'm not quite sure I follow the answer. Are you saying, Doctor, that the attorneys suggested this be put in, or are you saying you suggested to the attorneys that this be put in?

A. Your Honor, I would raise the question to the attorneys in the situation like this, the issue of self-incrimination, the issue of the possible utilization or scope of my findings, et cetera.

[123] COURT: It was your suggestion, really, then, that these things got in there?

A. And then the attorney would—would do what needed to be done to formalize this in the Court order.

COURT: No attorney came to you with an order already prepared and saying, "Doctor, these are the things I think ought to be in there"?

A. I'm not—I can't answer that specifically yes or no, but it's—likely that our consultation influenced, to some extent, the Court order.

COURT: All right.

BY MR. CULP:

Q. Isn't it a fact, Doctor Showalter, that different psychiatrists use entirely different systems of classification?

A. I'm not sure I understand your question. When you—if you could further define "different systems of classification."

Q. I mean don't they—does everybody who is practicing psychiatry do it exactly the same way?

MR. LOWE: Objection, your Honor, I don't think that question is suspectible to an answer, doing the same way. Do what the same way? Do the same technique in consulting, testing?

[124] COURT: I think the way you worded the question is probably objectionable. I think you should reword the question.

BY MR. CULP:

Q. All right. Well, let me ask you this. Wouldn't it be a fair statement to say that psychiatric conditions are subject to much dispute among psychiatrists?

A. Psychiatric conditions—

Q. Conditions.

A. Are much—in much dispute?

Q. In dispute among psychiatrists.

A. In respect to what?

Q. Suppose you had a woman who claimed she was Joan of Arc. Couldn't a psychiatrist say, for example, come up with a conclusion she was confused, one of them might come up with the conclusion she was psychotic, and one might come up with the conclusion she was delusional?

A. But those are neither mutually exclusive or mutually inclusive, Mr. Culp.

Q. Doesn't it show you don't always arrive at the same opinion? If you had three psychiatrists examine an individual,

would it be impossible or improbable that you would get different diagnoses?

[125] A. It would not be impossible to get some variation in diagnosis, but it's a matter—it's a matter of degree, I think, and—I would not want to—to respond to your question in such fashion to indicate in such fashion that would indicate that there is little or no diagnostic reliability among the various mental syndromes of mental disease and disfunction.

Q. Doctor Showalter, how many times have you testified in Court.

A. Several dozen or more.

Q. Would it be fair to say that on many instances that you have found yourself in disagreement with other psychiatrists who are also testifying?

A. Probably not in total disagreement, but—the—the disagreement to some degree or another, yes sir.

Q. All right. For example—

A. There's disagreement for today, for example.

Q. Yes. That's the point. In other words, would it be fair to say that you have been called into cases where the issue was the sanity of the defendant, and you put on testimony that, in your judgment, in your evaluation, that the defendant was insane? Have you ever been called upon to do that?

[126] A. I have.

Q. And at the same trial, have not the State put on psychiatrist, who have said in their evaluation and their judgment and their opinion that the same, very same defendant is, in fact, sane?

A. Surely.

Q. So you have been in conflict, wouldn't that be a fair statement?

A. That's true.

Q. So wouldn't that be—couldn't you draw from that that psychiatrists, when they look at an individual and examine him, may see the same thing perhaps, but simply conclude that it's a different illness?

A. This is possible up to a point. There's a latitude rather than areas of mutual inclusion or exclusion. I think it's terribly important to keep that in mind.

Q. Have you ever examined Michael Marnell Smith?

A. I talked with Mr. Smith on one occasion. I have not technically examined Mr. Smith.

Q. You don't know whether he's a sociopath or not do you?

A. I have not conducted the examination that would—allow me personally to render an opinion.

[127] Q. I understand. Now, you said you didn't believe that it would be possible to bring in—if I have it incorrect, you correct me. That it would be impossible, at least you didn't think you could, rule or make an opinion that a person was a sociopath based on a one hour interview.

A. That is correct.

Q. Now, let me see if I understand you correctly. Are you saying it cannot ever be done, or you just don't think you can do it?

A. I don't think that I could do it, and I would have serious question about anyone doing it, simply for the reasons not—this doesn't—reflect on anyone's qualifications, capabilities or diagnostic skills. It's a matter to thinking back to some of the discussion this morning, it's a time factor, how much verbalization can you compress into the actual running time of one hour.

Q. Doesn't a lot of that depend, Doctor Showalter, how cooperative the patient is?

A. Let's assume a maximally cooperative patient.

Q. You're saying that—even on the maximally cooperative patient, you don't think anybody could do it?

A. I would have—real question and [128] reservation about it, Mr. Culp. But let me say again, to be very, very clear on this, the limiting factor here is not the clinician. It's just that a person cannot say enough words in the course of sixty minutes. Fast enough.

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CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

* * * *

[172] DR. J.C. DIMITRIS — DIRECT

* * * *

Q. Let me turn to that, now. What did you actually advise Mr. Smith regarding the purpose of the examination and the possible uses of any disclosures, which he made to you, the first time you saw him?

A. Yes sir. What I advised, your Honor, the Defendant at that time was, first, I identified myself as "I'm Doctor Dimitris, the psychiatrist in forensic unit, and based on the Court order, I'm invited to examine you." At that time, the initial order was for competency to stand trial. It was another letter I got from Mr. Person, the Commonwealth Attorney of this City, that advised me that he was submitting additional information pertaining to the competency at the time of the alleged offense. And he wanted me to expand on that in my final report to the Court.

Q. May I interrupt?

A. The initial warning to—

Q. Let me interrupt. At that point, it was on the request of the Commonwealth Attorney—

[173] A. Yes. I have a letter.

Q. That you inquired into the insanity at the time of the offense?

A. I have a letter. I don't know if it is part of the record.

Mr. Bonnie: I don't think so. I have not seen it.

Your Honor, I don't believe that this is already part—of the Court record in this case. If Doctor Dimitris doesn't mind, I

would like to have a copy made and have it entered as Petitioner's exhibit.

A. I ask that I be allowed to have a copy of that for my record.

Mr. Culp: I have seen it.

Mr. Bonnie: Have you a copy of it?

Mr. Culp: I don't have a copy, but I have seen it.

Mr. Bonnie: At sometime, we'll get a copy and submit it as Exhibit Number Four.

(At this time, the letter was received and marked as Petitioner's Exhibit Number Four.)

By Mr. Bonnie:

Q. I'm sorry. You may continue, the question being what did you tell Mr. Smith.

[174] A. Identified myself and the purpose of the examination. That I told him that it is now his privilege to elaborate on the given subject, because I asked him if you knew the charges. He responded, giving me the outline of the charges. Rape and murder. And I told him that, "I'm here to listen to you, to anything you want to say, provided you understand that this is going to be part of the record, and the record will be used one day against you in a Court of Law." That was the warning.

* * * *

[176] Q. With regard specifically to the nature of the warnings, that you gave, I just have a series of specific questions given the content of the warning that you actually gave him. In the statement that you've reported, did you tell him specifically that the information that was obtained in the course of the evaluation could be used against him in connection with the capital sentencing proceeding that might be held in Virginia?

A. No sir. I didn't mention the word "capital" punishment. I mentioned to him that whatever he would say to me during

the transaction with me and the personnel, it would be used against him in a Court of Law [177]

Q. In a Court of Law. Yes sir. Did you specifically tell him before or during your examination that he had a right to consult with his counsel or to have counsel present during the examination?

A. No, your Honor, I didn't mention about the counsel being present, because I can explain why not, if that's interest to the Court.

Court: The question is did you tell—did you tell him.

A. I didn't tell him about the lawyer being present, but I told him that any time he wanted to consult with his lawyer was perfectly all right, because the lawyer was already involved in the case, actively. So—this is my warning to everybody, if you like to talk to your lawyer, at any time, feel free to do so. But I don't invite lawyers to be present during my examination.

Q. This was—your practice in 1977, when you—

A. All along.

Q. Okay.

A. All along.

Q. Did you tell him during the course specifically tell him during the course of the examination [178] that he had a right to terminate the interview or the evaluation whenever he chose?

A. Not in these words, your Honor. I told him that he had the opportunity to talk as much as he wanted about anything he wanted, provided he understood that this is going in the record, and that it was going to be used against him. So—this way, in my judgment, I made clear to him that he can start and finish any time.

Q. After you gave him the initial warnings that you have described, did you encourage Michael Smith to cooperate in the

interview and make disclosures to you in order to facilitate your own evaluation?

A. Now, the word, your Honor, "cooperate" maybe having—maybe has many connotations.

Court: He asked "encouraged." Did you encourage him?

A. Encouraged, this is another thing, which is a different question. Encouraged is giving him a cigarette to somebody who smokes.

Mr. Bonnie:

Q. Let me withdraw the question and ask you this. Did you tell him that it would be helpful to him—

A. No sir, I didn't.

[179] Q. If he cooperated?

A. I don't use the word "helpful." As being found in the Gibson case, it is—something that—without any investigation of the case, the word appeared in the final statement of the Court, but I never tell the people it's helpful to the person.

I might say, "It's helpful to me to understand the case," but not to the person, per se. I say, "It helps me to understand your case, but I don't know if it helps you, because whatever you say is part of the record, and the record may be used against you." And I tell them this, so I don't go with one word, "helpful." I say, "Whatever you say to me, it helps me to understand. If it helps you, you have to decide for yourself, because it goes in the record, and the record would be opened by the Commonwealth Attorney one day, and it can be used against you in a Court of Law."

And this is kind of broken record down, you know—to the simplistic language that is used for the defense. If he doesn't understand, I say, "Would you like to call your lawyer? Be glad to call your lawyer on my phone, talk to him."

Q. Let me ask you this question. Do you believe that you would—it would be possible for you to render an informed clinical opinion regarding a person's [180] mental state at the time of the offense if he were to refuse to discuss the circumstances of the offense with you?

A. Your Honor, most of them are not, the people, they don't remember, they didn't do it.

Court: They know nothing about it.

A. You know—so—it is helpful for me again, and I underline the word "helpful" for me. Not for the Defendant. To tell me as much as possible, anything he wants, because what I appreciate in the interview is the way the person talks, modulates his thoughts, makes sense or doesn't make sense. If he talks about the offense, so much the better for me. Again. How much it is for the Defendant remains to be seen. And I give a warning even today when the Gibson is clear, with regard to the stipulation of if you plead innocent, if you plead not guilty, that's confidential. If you plead insanity, it's a risky deal.

As I say, more often than not, ninety-five of the people state they don't remember, they didn't do it, somebody else did it, it was accidential bystanders, whatever. Unfortunately for me, but I understand the reasons that the person does it, because, after all, he sees the writing on the wall of what's going to happen if he be found guilty, I don't have that cooperation. And [181] the I write the letters to the defense and the prosecution. I say, "Gentlemen, would you kind—be kind enough to tell me the rest of the story?" And then I give you a kind of educated opionion, based on the hearsay, because until we go before the Court, nothing is factual. Everything is fantasy.

By Mr. Bonnie:

Q. Isn't, again, just to pick up on your testimony, isn't it true that it's not only helpful to you, but essential for you to discuss the circumstances of the offense with cooperative defendant, in order to be able to tell, to give an opinion about what the mental state of the person was?

A. If the person does it, so much the better for me, and hopefully for the defendant. I don't know about it.

Court: The question is, he asked you, is it essential that you get that information from the defendant or perhaps someone else, in order to have—

A. It is helpful. But essential, then we have to close the forensic unit, we don't get it.

By Mr. Bonnie:

Q. I said with regard to rendering an informed opinion, on which you would give expert testimony for or against concerning the person's mental state at the [182] time of the offense, not competency to stand trial at the time of the offense.

A. Yes, it is helpful for me. But if it is essential, as I say, I don't have it most of the time. So—

Q. In those cases you do not give opinions?

I give—opinion, hypothetical then.

* * * *

[186] Q. Doctor Dimitris, what has been has been your practice concerning this question of warnings since the Gibson decision was decided in the Federal Courts? Have you changed your practice, and could you describe in what [187] ways it is different now?

A. Your Honor, the way it is different now, as I mentioned briefly earlier, I tell now the defendant, the suspect, that I ask him if he knows about the charges, I get an idea that the person is together and can communicate with me, because if a person is psychotic, of course, I cannot go into the aspects of the crime at that time without having more awareness from his lawyer and anybody else as to what is the wish of the other side in regard to that, that situation. So for a person that is able to communicate with me, I tell them two things.

I say, "If, Mr. Street, you are intending to—plead not guilty to the charge involved, whatever you say to me is not going to be used against you in a Court of Law as a proof of criminal action. But if you planning to plead not guilty by reason of insanity, I wonder if you have discussed with your lawyer whether you should talk to me about the ingredients pertaining to the alleged offense or not. And if you didn't, would you like to call your lawyer and get his advice?"

Q. Would you say that one of the consequences of the revised warning procedure that you were following is greater and closer or greater possibility [188] of involvement of attorneys during the course of the evaluation process?

A. Well, most of the time, what I get is that—either "I don't have an attorney, yet, or my lawyer told me to tell you everything, or sometimes yes, I appreciate that, let me talk." And usually they—I call the attorney in my office and introduce myself, saying, "Would you now talk to your client?" Or if the client wants to have more privacy, "Get the public telephone downstairs and call your lawyer, and I'll allow you to come back and tell me what you want to do."

Q. All right. Turning to Mr. Smith's case, particularly again, at any time during the course of the conversations that you have described with Mr. Pugh or Mr. Wood, did either of them direct your attention specifically in any way to the issues that could be—that would be litigated in a capital sentencing proceeding? You were in the Courtroom this morning. I suppose I need not quote again.

A. Yes sir. So, the question?

Q. During the course of your conversation, did they direct your attention specifically to those questions.?

A. No, your Honor, I didn't have the opportunity to go into the specifics of the capital punish- [189] ment law, because, if memory serve me well, the—the case was approved by the

General Assembly that year.

* * * *

A. Yes, so, I believe the case was—the decision by the General Assembly was during that session, '77, that the law was not distributed yet to us in the State hospitals, or any other institutions, because it was enacted, I believe, sometime in July. So I didn't have the wording of the law, neither Mr. Pugh give me the wording of the law. He went into the ingredients of what the law provides, but not—candidly as 19.2-264.4, not as such, but—Mr. Pugh showed special consideration in regard to what was the finding. He was not—satisfied with the basics. He wanted to go into another facet of his life. And, of course, based on the fact that I wanted to avoid to expose Mr. Smith in problems later, I [190] wanted the guidance of Mr. Pugh as to what area of the life of Mr. Smith he thought were important for his case. And, therefore, we—worked in tandem with Mr. Pugh, either by his personal presence at Central State, not at the time of examination, of course, or by phone calls, directing us in regard to his status.

All in all, in summary, your Honor, I did have awareness of the law, per se. The first time I became aware of the law was before the last phase of the trial in here, when Mr. Person showed me the text of the law.

By Mr. Bonnie:

Q. Doctor Dimitris, when you say that—Mr. Pugh or someone brought to your attention the basic ingredients, what were you referring to?

A. Basic ingredients I mentioned, I believe, in regard to what transpired in regard to the offense. I'm not talking about, Mr. Pugh was anxious for me to cover certain things, which, in his judgment, were important in the overall evaluation of Mr. Smith. I'm not talking about the ingredients of the crime right now. I'm talking about the ingredients of his personality.

Q. You're not referring to the ingredients of the law?

A. Not of the law. Not the crime, per se [191] I'm talking about military service, religious experience, and things of that sort.

Q. What you were discussing with him were some broader components of your evaluation concerning his personality and so on?

A. Overall adjustment in life, mainly his military experience were different from his everyday life in Williamsburg.

Q. If I may ask: the question I asked you before again, at no time until Doctor—Mr. Person showed you statute on the day you came to this Court to testify, did anyone bring to your attention the, either a copy of the law or quote to you the specific mitigating mental abnormality provisions, which you heard me quote earlier today?

A. No sir, your Honor, until Mr. Person was kind enough to show me the law.

Q. In the course of the conversation that you had with Mr. Pugh or Mr. Wood, in which you discussed with them your findings or conclusions, was there any discussion of whether your testimony might be of interest to the defense in connection with the capital sentencing proceeding specifically, not now on the question of McNaulton or irresistible impulse, but specifically on the context of the capital sentencing proceeding?

[192] A. No, your Honor, it was—the capital sentencing was not—brought into play, so to speak, at that time. The thrust was it was any evidence of insanity, is the impulse, or any mitigation whatsoever.

Q. When were you first—when was the first time that you were asked to focus on—focus your clinical eye on the issues that could be presented at the capital sentencing proceeding, and by whom?

A. At the time I was—called by Mr. Person, when I was served the subpoena, he indicated that the trial was bifurcated. The jury would decide first guilt or innocence, and then go into

the final phase of imposition of sentence. At that time, I received a subpoena and a call by Mr. Person, indicating that I had to appear for the finalization of the case, and then I became aware that this man was going to be and not for the guilt or innocence any more, but for the disposition of the case.

Q. Did Mr. Pugh or Mr. Wood, in any conversation that you had, with them, direct your attention to the diagnosis rendered by Doctor Pile and discuss its possible implications with you at the capital sentencing—at the capital sentencing proceeding?

A. I don't recall that element.

[193] Q. Did you have any conversation with Mr. Pugh or Mr. Wood on the day of the capital sentencing proceeding, other than the time that you were in Court itself, any preliminary conversations?

A. I believe, yes, I saw both adversaries, the Commonwealth Attorney and attorneys for the defense, briefly that morning. Nothing that was discussed, except that Mr. Person asked me about—my testimony, what's going to be generally based on the evidence or based on the law.

A. You had conversation with Mr. Person concerning your testimony, but not with Mr. Pugh or Mr. Wood?

A. No.

* * * *

[204] By Mr. Bonnie:

Q. Doctor Dimitris, you heard the testimony, I suppose that's the easiest way to do it. I was willing to try to make a hypothetical question out of this. With all the assumptions that I would like for you to make, but you heard the testimony concerning Doctor Pile's evaluation.

A. Yes.

Q. You have been here all day, and I suppose that the easiest way to ask the question, do you think that met the minimum standards of competent evaluation in forensic psychi-

atry in order to answer the kinds of questions that are posed in a capital sentencing proceeding?

A. Your Honor, I have to tell you that [205] I don't know any specific standards, per se, in the field. It is a matter of organization of the examiner as to what he's aiming at and he's satisfied with his examination. Personally, I want to be able to do that in our time. This is my limitation. Probably I have half as much experience as Doctor Pile in the field, and, therefore. I have to plead to you I cannot do it in an hour's time. Now, what makes the difference in any business, and mostly in our field, is that the quality of the time, not the quantity. How much time you spend—

Court: Did you say it was not the quantity of time, but the quality of time?

A. That makes a difference. In other words, what I would like to know, at this time, is if Doctor Pile can produce any notes or a tape from the interview or stenographic representation, because oftentimes when—they send us patients on our patient basis, then we have a stenographic representation of the statements altogether. So I wonder if such documents exist. Then I would be willing to give you more accurate reflection on the work of Doctor Pile. Personally, as I say, I won't be satisfied to do it in forty-five minutes to an hour, because probably I'm limited mentally to do that, but—other people might do it.

* * * *

By Mr. Bonnie

Q. Doctor Dimitris, on the basis, keeping in mind the set of assumptions that we are operating under, one of which is that that letter contains the total of the clinically relevant material, including the areas that were covered and, by inference, and, by inference, the areas that were not covered, because they were not mentioned, and the degree of depth represented by those clinical observations, do you think that such an evaluation would—would be adequate, would meet the minimum standards of adequacy within the profession of forensic psychiatry

to deal with the kind of issues, I'm not talking about competency to stand trial, to deal with the kind of issues regarding mitigating mental [212] abnormality and prediction of future behavior that are most germane in the capital sentencing proceedings under Virginia law?

A. Now, the thrust of the question, your Honor, please correct me if I wrong, is that if this examination will be germane, relevant to be utilized for mitigation, or for—the deliberations pertaining to the capital sentencing law. In other words, how much relevant is this, how much this can help?

Q. No, that's not the question. Is the evaluation, contained therein, and under the assumptions that I have tried to carefully specify, adequate, according to the standards generally accepted within forensic psychiatry, based on the literature, based on your attending of professional meetings and training programs, to provide a clinical basis for expert opinion on the issues regarding mitigating mental abnormality, but I can quote, but I don't see any need to, and prediction of future behavior, which are the—among the central issues in a capital sentencing proceeding under Virginia law?

A. So if I understand, well, maybe I'm thickheaded. Again we're going to this examination, is of any relevance and usefullness in the final arguments about mitigation—

[213] Court: Let me rephrase the question, Mr. Bonnie. Maybe I can do it a little better.

Mr. Bonnie: Maybe you can do it a little better than I can.

Court: Based on this, the man who made the record, use that basis to testify as to the future behavior, and whatever the other thing concerning is that your question?

Mr. Bonnie: Concerning mitigating, concerning mental abnormality at the time of the offense as defined in the Virginia statute.

Court: Whether—

Mr. Bonnie: Is that enough of a basis, is it an adequate basis to provide to permit the expression of an expert opinion among—as defined within the context of the standards generally accepted within forensic psychiatry?

Mr. Culp: If it please the Court, I don't want to belabor the point, but I think that the record shows that the Commonwealth called Doctor Pile and didn't go into his evaluation at all.

Court: I think that's his point, Mr.—if I may make the point for the record, Mr. Culp. I think that his whole total reason we are here today, the whole reason we are here today at all is the fact that [214] Doctor Pile was called by the Commonwealth, and Doctor Pile wasn't asked these questions at all, but it was by the defense that these matters were brought out. And that's why he's here, claiming it was incompetent for them to do so. I am sometimes stupid, but I'm not exactly lost on these matters.

Go ahead, Mr. Bonnie.

Mr. Bonnie: I think I asked the question. I'm waiting for the witness to answer.

A. What I can say, your Honor, is that the diagnosis of sociopathy is not substantiated by the text, this text here.

Mr. Bonnie: That's the answer. Thank you very much, Doctor Dimitris.

That's all the questions I have.

CROSS EXAMINATION

By Mr. Culp:

Q. Doctor Dimitris, you indicated in your testimony that you were not shown or told about the specific matters in the sentencing proceedings in Virginia under Section 19.2-264.4 until you came to Court, I think, on the day for the sentencing hearing and talked to Mr. Person.

[215] A. Person.

Q. And my question to you is this. Did your examination, that you conducted without knowing about these two specific things, was it sufficient to allow you to draw an opinion on both of the issues, of which we have discussed today? That being was the felony committed while the Defendant was under the influence of extreme mental or emotional disturbance, or at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or conduct his conduct to the requirements of law was significantly impaired. did your examination allow you to draw an opinion on each of those issues?

A. Your Honor, I believe so.

Q. And what opinion did you arrive at?

A. In the first question about it was under extreme duress or stress, overwhelming situation, my awareness of the facts of the case, based on the statements of Mr. Smith, to the investigating officer, and then to me, did not indicate that the man was of any duress of anybody. Because not, it was not abducted, was not captivated, was not threatened or anything. Was a Good Samaritan type activity that escalated into a tragedy, by his own activity.

In regard to any other mitigating [216] circumstances that—for which he couldn't understand the criminality of the act, beyond mental illness, anything else, nothing else was in evidence, which could be a mitigating circumstance, per se. Because the man took other precautions to protect himself. He put the condom on, did other things to protect himself from disease, hoping he would be successful to get away. Unitl he was investigated by the officers here in the Williamsburg area, he didn't divulge any information to anybody, so was—clearly aware of the criminalilty of the act, and he didn't spill the beans to anybody.

Q. Doctor Dimitris, is it fair to say that psychiatrists frequently disagree over their diagnosis?

A. I hope, your Honor, it is not frequently, but it is not unusual either. Not frequently, but not usual.

* * * *

Q. I think you testified that in a psychiatric examination, it is the quality of material which is forthcoming, rather than the quantity of time [220] spent which would determine whether a psychiatrist can draw a—a satisfactory opinion.

A. Absolutely. I believe in every business, and more so in our field, what makes a difference is how much the time is utilized meaningfully. You can spend enormous time and spend days and days, and tell the Court, "I spent five days examining the defendant." That makes no difference if I spent five hours or one hour for that. The essence, what has been accomplished in this hour, what—really, topics have been dealt with and what depth.

* * * *

CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

[232] D. F. PUGH—DIRECT

* * * *

BY MR. BONNIE:

Q. Mr. Pugh, the record indicates that you requested a psychiatric exam by Doctor Palmaz or Doctor Stokes, I think is the way it reads, which was ordered by the District Court on May the 26th. Why did you request that examination?

[233] A. I believe my thinking at that time was that due to the seriousness of the charges, and of the nature of the facts of the crime, that I had in my possession, as well as, I guess, trying to seek out and preserve and adequate defense, I felt that that would be a good approach to that. It was—more or less, I felt I had to assert it.

Q. I take it that you were not particularly concerned about Mr. Smith's competency to stand trial, but you were more interested in possible exculpatory defenses.

A. That, too. I was interested in exculpatory defenses and also, as I said, as I became familiar with the facts of the case, and I had, prior to asking for that report, the nature of the crime itself caused me to do it.

Q. You're, again, I'm interested in why. You thought that psychiatric testimony might be helpful at trial?

A. I felt that he should be examined by a psychiatrist due to the charges that he was charged with. And after having read the statement that he allegedly gave to the police.

Q. The record indicates that you requested a further examination at Central State Hospital, which [234] was ordered by the District Court on July 1. Why did you seek that examination?

A. Well, that's—with Doctor Dimitris?

Q. Yes.

A. I felt at that time that the—I called it, more or less, a short time approach that Doctor Stokes or Doctor Palmaz had done, and I still felt uneasy about the matter of—of his competency, or if, in fact, there was some other mental disorders other than him knowing right from wrong or him being sane or insane that I wanted to explore, realizing that—it was a bifurcated proceedings and if we got to the second stage of that proceeding, that any type of mitigation that I would have might be of benefit to him.

Q. In light of the—of your interest, which you just described, in psychiatric evaluation, why was the Court order issued on July 1, as well as the one on the 26th of May, limited to an assessment of competency to stand trial? The exact language of the Court order, "Does the person have substantial capacity to assist his attorney in his defense?" But focuses on competency to stand trial. Why weren't the concerns that you just described specifically articulated in the Court order?

A. I assumed that—that by having him up there for a period of forty-five days, I believe, [235] at that time, that they would give him a complete staffing, psychologicals and evaluations, and things along that nature, and I assumed that if there was something—I didn't feel they would be limited by the Court order. That was my impression.

Q. Okay. Turning now to the question of advising Mr. Smith as to how he should deal with these psychiatric evaluations. Did you specifically advise him regarding whether or not he should disclose and discuss the details of the offense or any other prior offenses, which he may have committed before the time he was committed to Central State Hospital?

A. Yes.

Q. Could you describe what your advice was, and try to recall, if you can, I know it's difficult, when you might have given that to him.

A. I can't give you the exact dates, but I know that when I was initially appointed to Mr. Smith, I think our first conversation, I think the first thing that I told him was that he was not to discuss this case with anyone other than myself. At that particular time, at the preliminary hearing, I was the only attorney appointed to represent him, and Mr. Wood came later and was appointed by the Circuit Court. I specifically told him, prior to the preliminary hearing on his charges, not [236] to discuss the case with anyone. With reference to the psychological evaluations that he would have received, that he did receive, prior to him being examined, I know I was present and Mr. Wood was present at a later date, but prior to that time, I had told him not to discuss the case or any offenses that he had committed in the past with anyone, and I believe he understood what I was saying at that time.

Q. Did you advise, apart from the general advice that you have just described, did you advise him specifically with regard to what his posture, in terms of disclosures and so on, should be during the course of the psychiatric examination at Central State?

A. I told him not to discuss the case with anyone, and I don't remember if I said "anyone and that includes the psychiatrist or a doctor," and I made it crystal clear, I know, on the—at the second time, in which we were appointed in Circuit Court, we went back to that room, the last room, and the main thing we wanted to determine that he would not in the future discuss any offenses that he may have committed that were not reported or any offenses or the present offense.

Q. When he was sent to Central State, were you concerned that he might not either be able to understand or follow your advice in the context of a [237] psychiatric evaluation, particularly in light of his prior experience with the police, and the statements he had given to the police?

A. No.

Q. This was not a matter of concern to you?

A. No. The reason being, well—the reason being is that—the reason I thought I had discovered, in our conversations together, the reason that he made the statement to the police. And I didn't think those same reasons existed.

Q. So it was your expectation, when he went to Central State, that he would not discuss the circumstances of the offense or any prior offenses with the psychiatric and psychological staff at Central State?

A. Basically, yes.

Q. Let's assume that Mr. Smith would have followed your advice. Did it occur to you then that an expert might be unable to render an opinion of the type that you were seeking concerning possible mitigation, that you described earlier in your testimony, if the client is silent regarding the details of the offense and regarding any relevant past history, including prior criminal offenses? Did this occur to you at that time that you were formulating your advice to him?

[238] A. No, it didn't.

Q. Did it occur to you at that time to get a, what we might call a protective order from the Court to the effect that any incriminating disclosures, which he made during the course of the psychiatric examination, could not be used against him as part of the prosecution's case at either phase of the trial unless it was necessary to rebut defense testimony? Did you consider at that time getting such an order?

A. No.

* * * *

Q. The record indicates that on September 28, you moved or asked the Court to grant a motion for a further psychiatric examination by Doctor Pile. Could you explain what your thinking was at that time and what your purpose was in seeking this additional evaluation after the evaluation by Doctor Dimitris and his staff at Central State?

A. I think it was, basically, I still was—I was dissatisfied even with Doctor Dimitris' report and I felt that even at worst, that the next psychiatrist would, more or less, support Doctor Dimitris' report in his finding and diagnosis, or he might find some other mental disorder that Doctor Dimitris didn't find. And then I was still—I still had this gnawing thing about the facts of the crime and the fact that both doctors that he had gone to previously, both psychiatrists had said that he was of sound mind. I was still looking into that, still—

Q. You still had your own doubts about that?

[244] A. I still had my own doubts.

Q. When you specifically requested the Court to grant an additional evaluation by, or support an additional evaluation by Doctor Pile, why did you specifically take Doctor Pile?

A. Well, I think by—I had heard of Doctor Pile by fellow attorneys I had talked—talked to, and I understood that he had done that type of work for the Court and for defense attorneys. And—I knew he was in charge of this Bayberry Psychiatric Clinic, and I felt that he was qualified to do it. There was nothing personal that I knew about Doctor Pile other than what I had heard about him.

Q. Before the examination itself, which, I think, was on October the 1st, did you have any conversation with Doctor Pile concerning this—the fact that you were requesting such an order and regarding the purpose of such an examination?

A. I remember calling the office. I remember talking to Doctor Pile or someone on the staff, and I introduced myself and told them about the entry of the order, and they would be receiving it from the Court.

Q. Whoever you talked to, that was the extent of the conversation, to notify them this order would be entered?

[245] A. Yes.

Q. I'm going to go over the same material concerning your advice to Michael Smith regarding this evaluation that we covered with Doctor Dimitris. First, did you specifically advise Michael Smith regarding whether he should make any disclosures or discuss the details of the offense, with which he was charged?

COURT: Mr. Bonnie, I thought Mr. Lowe asked him that question. Didn't you tell him who he talked to and who he shouldn't talk to?

MR. BONNIE: I'm sorry.

COURT: Somewhere back in your beginning of yours, you asked him the same question.

MR. BONNIE: I'm sorry. It seemed so long ago, I asked him the same question with regard to Doctor Dimitris' evaluation, and now I wanted to get specific information about Doctor Pile.

COURT: Doctor Pile, all right.

BY MR. BONNIE:

Q. Did you specifically advise him regarding the—the possible use of that information, with regard to Doctor Pile's evaluation?

A. I don't recall being specific with him and him not making a statement to Doctor Pile about any offenses. I don't remember telling him anything about [246] that. I had—I know I had—whenever he was—examined, I know that I would—we would talk, and he would ask me, you know—he would ask me what was happening, and I would tell him, and I would—I would sort of like to end on the note to keep everything that—that we know as happened, to himself. I did not specifically tell him not to say anything to Doctor Pile about the offense or any offenses.

A. Was it your expectation that he would not—that he would realize the advice that you had previously given him, the general advice not to discuss the details of the offense with

anyone except you was continued in effect with regard to this evaluation, was that your expectation?

A. Yes, that was my expectation.

Q. Did you have any concern about that expectation in light of the discussions that you had had with Doctor Dimitris concerning Mr. Smith's apparent willingness to discuss the details of that offense and prior offenses with him?

A. I didn't have any concern with it. I know that—after he had come back from Dimitris, being examined by Doctor Dimitris, I believe what happened was we were then—we were, at that time we were not appointed at the Circuit level, and I remember the incident of Mr. [247] Wood and myself and Mr. Smith, we went back into the room. And at that time, we discussed the matter of him talking to anyone again. And I think we tried to make it very clear at that time for him not to make any statements regarding any past offenses or the present offense. And I thought, based upon that, that he would not. And when he went to Doctor Pile, I had no idea that he would make any statements, and I felt at ease. I didn't worry about him not—him making a statement.

Q. Your expectation was that he would not. That as a result of this conversation here at the time you all were appointed at the Circuit Court level, that as a result of that conversation, he would not discuss the details of this offense or any previous offenses with Doctor Pile?

A. That's correct.

* * * *

[248] Q. Mr. Pugh, assuming that Michael Smith had followed your advice, had it occurred to you by this time that if he had done so, that an expert might not be able to render an opinion about the questions you were really trying to get him to address?

A.—No.

Q. Again, did it—had it occurred to you by this time that perhaps it would be useful to get a protective order, in order to facilitate disclosures by the client, and yet protect his Fifth Amendment rights?

A. It didn't occur to me.

Q. I should also clarify something that I was assuming from your prior testimony. Were you aware, in giving this advice to Michael Smith, that he should not discuss the context of the offense, details of the offense with anyone, were you aware of the Gibson versus Commonwealth decision, 216 Virginia 412, 1975?

A. I was aware that whatever he told [249] the psychiatrist could be admitted in Court.

Q. Okay.

A. I wasn't aware of that particular case.

Q. Okay, that stand for that proposition. At least at that time it did. Did you meet with Mr. Smith in close proximity to the time he went to see Doctor Pile, in order to re-enforce the advice you just described?

A. I don't recall.

Q. Did you accompany him to Doctor Pile's office, for example?

A. No, I did not.

Q. Did you, at any time before Doctor Pile conducted this evaluation, bring to his attention the specific provisions of the capital sentencing procedures that I referred to earlier?

A. No, I did not.

Q. The record shows that Doctor Pile sent you a report, dated October—excuse me, sent a report to the Court, dated October 1, which, copies of which were sent to you and the Commonwealth's Attorney. What were your reactions when

you received this report? And I can show it to you to refresh your memory.

A. Is that the letter he wrote me?

[250] Q. The letter he wrote, dated October 1st, his report. Do you recall that? Would you describe your reaction?

A. My reaction, I was shocked; I was upset. And I think shocked and upset sums it up.

Q. Were you satisfied?

A. No, I wasn't.

Q. Why were you dissatisfied?

A. I was dissatisfied mostly with the diagnosis. Primarily, I was dissatisfied with the information in the letter with reference to an incident on the bus. I was very dissatisfied with that.

Q. Why—

A. And then I was dissatisfied with myself for having selected Doctor Pile.

Q. Why were you particularly dissatisfied and shocked, angry, with regard to the incident on the bus?

A. Because I had never, in my conversations with Mr. Smith, I had never heard of the incident before. It was new to me, and it came as a shock to me. And based upon getting the letter, I believe I—I went over and I talked to Mr. Smith about that particular incident.

Q. What particularly made you angry, [251] frustrated, dissatisfied with the diagnosis that was the other factor that you mentioned?

A. Well, I could not phantom in my mind how he could have come back with a diagnosis of that nature when he had only examined him for a short period of time, whereas Doctor Dimitris had him up in Central State for a period of forty-five days and had a different diagnosis.

Q. Were you also concerned about these matters because the report was in the hands of the Commonwealth Attorney as well as your own?

A. I felt at that particular time that, after having read the letter, and I know—I believe Mr. Wood did too, we felt that at that time Doctor Pile would be called as a witness for the Commonwealth because of the information in there relating to that incident on the bus. As well as the diagnosis. Not so much the diagnosis. More about the incident on the bus, I was thinking.

Q. In retrospect, do you think you should have considered getting or seeking a protective order of the type that you—we discussed before?

* * * *

[252] COURT: For the record only, but [253] without any—looking back at it, Mr. Pugh, is it safe to say you would have done all these things if you thought about it?

A. Yes.

* * * *

[254] Q. Let's move to the trial itself, or at least the sentencing phase of it. Did you plan to call Doctor Pile, for example, as your witness?

A. For which stage?

Q. At the sentencing phase, did you plan on calling Doctor Pile as your witness?

A. No.

[255] Q. Again, at the risk of belaboring the obvious, would you state why not?

A. Well, I felt his—the information that he would testify to would be damaging, but you have to remember—

Q. Specifically—

COURT: Let him answer the question.

A. But you have to remember, and I don't—looking back two years ago, a lot of things I don't know why I did a certain way because of the case and what was going on, but—

COURT: The most honest answer that has been given in this Courtroom today.

A. But I know it was a lot of things going in my mind about Doctor Pile. I did not feel his testimony would benefit Mr. Smith.

BY MR. BONNIE:

Q. It was—you clearly had made the decision not to call Doctor Pile as your witness, is that right?

A. I was not going to call Doctor Pile.

Q. And you said that you—the reason, one of the reasons was that you did not think his testimony would be helpful and it would be damaging. What [256] specific respect were you concerned that his testimony would be damaging?

A. Well, with reference to the sentencing phase, we knew the accused had prior offenses, and history could be introduced at the sentencing stage of the trial. The incident on the bus would, in my thinking, be harmful to Mr. Smith. The diagnosis would have been harmful.

Q. When did you first become aware that the Commonwealth was going to call Doctor Pile, summons Doctor Pile, and call him as his witness at the capital sentencing stage?

A. I can answer that by saying that once I received Doctor Pile's report, I had a feeling that the Commonwealth would call Doctor Pile. I do not know when I received information that the Commonwealth would call Doctor Pile.

Q. Did you subpoena Doctor Dimitris as a defense witness at the capital sentencing phase?

A. I don't recall.

Q. You don't recall whether you did, or do you recall deciding that you did not want to?

A. What Doctor Dimitris said, we felt, was not that injurious to Mr. Smith. I don't recall.

Q. All right.

A. I knew he would be called by the [257] Commonwealth. I had—through the discovery, they had given us, Commonwealth's Attorney had given us a list of witnesses that he anticipated on calling. At that time, when we first obtained that list, Doctor Pile, of course, his name was not on there, because he wasn't even in the picture at that particular time.

Q. If the Commonwealth had not put on Doctor Dimitris, even though he had been subpoenaed at the capital sentencing phase, would you have called him as your own witness?

A. Probably, yes.

Q. Did you consider at that time, maybe I should put it in that context. Did you consider at that time what you would do if or was it just clear to you that the Commonwealth was going to put him on?

A. I felt the Commonwealth was going to put him—put Doctor Dimitris on.

Q. Okay. On direct examination, Mr. Person asked Doctor Pile, as you expected, about the bus incident. Then on cross examination, you asked him about his diagnosis. And I can get the transcript out to read it, but essentially the question was pretty clearly, "What was your diagnosis, Doctor?" Why did you do that? Do you recall what your thinking was at that time, why you did that, in light of all that we have been [258] discussing here in your testimony?

A. I really can't recall why I did it. I think at that time I was so wrapped up in the trial—I know we had—I know there was some discussion briefly with Mr. Wood about the doctors' testimony, that is Doctor Dimitris and Doctor Pile, but why I

asked that, I don't know. I think maybe, you know—thinking back, now looking at it, probably because I—you know, I still was thinking about the time in which Doctor Pile had spent with Mr. Smith. And if I am not mistaken, I think Doctor Dimitris had testified and had said what he had to say with reference to the time and what he had diagnosed, and—I know all of that was running through my mind. I really can't say why. I think maybe that was it.

Q. Let the record—I think the record will show Doctor Dimitris testified after Doctor Pile did, and the only thing that had come out at that time had been the bus incident on the Commonwealth's testimony. And you—I guess your testimony is you don't know why you asked Doctor Pile the question that you asked him.

A. Basically, yes.

* * * *

[259] EXAMINATION

BY MR. CULP:

Q. Mr. Pugh, you indicated you had as opportunity to talk with Mr. Smith seven or more hours about the case, incidents, how it occurred, and this sort of thing.

A. Yes.

Q. Did you have a full opportunity to discuss with Mr. Smith everything about how it occurred, what his version was and go into any grounds of defense he might have?

A. Yes, I did.

Q. And during any of these discussions, was he able to relate to you in a manner, in which you could understand, what his version was?

A. Yes.

Q. Were you able to converse with him so that you felt that he could understand what you were talking about?

A. Yes.

Q. Now, you said you talked with Mr. Smith about not discussing the case with anyone. Did you do that on more than one occasion, or just one occasion?

A. More than one occasion. I remember [260] two vivid times. That is when I was appointed and also when I was—when I was appointed at the preliminary, prior to the preliminary hearing, and also, I believe, it was the same day that Mr. Wood and I were reappointed in this Court.

Q. Did you talk to Mr. Smith prior to the time he was going to be examined by Doctor Dimitris and Doctor Pile as to—that he would be going down for an examination, or did you have any discussion with him at all?

A. Yes, I discussed with him that he was going. I think on each time when he was examined, prior to that examination, I told him what—was going on and what to expect, as far as the examination that "A doctor will examine you in reference to your sanity and competency to stand trial," and—and that—and things of that nature.

Q. Did he raise any objection to doing that?

A. No.

* * * *

[261] Q. You also asked the Court to give you a private psychiatric examination, after Mr. Smith had been to Central State, and the Court did that, did it not?

A. Yes.

Q. And you were the one that chose the psychiatrist?

A. That's correct.

* * * *

[264] Q. When you went down and talked to Doctor Dimitris, did you have occasion to discuss with him possibilities of mitigation?

A. Yes, I do remember talking with [265] Doctor Dimitris with reference to treatment for an individual diagnosis, having an inadequate personality, and you want me to tell you what he said?

Q. Yes, you can answer.

A. Okay, well, Doctor Dimitris indicated to me that it would be left up to that particular individual. He also expressed to me his belief that, you know—everyone has a degree of inadequate personality in some respect. That it wasn't something that was—that happens overnight. That it's a long term process, and some individuals have a greater, let's say, inadequate personality as opposed to others. And he indicated also that—that treatment would be left up to the individual, how that individual responded to treatment, cooperated.

Q. But he indicated to you that persons with inadequate personality could be treated?

A. Yes.

Q. Now, you answered that when the Court orders were entered, you did not seek a protective order to protect anything that he might say. You said you didn't consider that. Can you tell us why you didn't consider that?

A. Which one, on all of them?

Q. Any time you got the protective—I mean any time you had the order entered for the examination, [266] the record shows there was no protective order sought by you, and I think you testified you had not sought one. Can you give us an explanation of why?

A. Well, my main reason, I would imagine, was that I had talked with Mr. Smith with reference to him not making any statement, reference prior offenses that he may have com-

mitted or present offense. And it was my thinking, after talking with him, that he had understood what I had said, and that he would not make any further or make any statements whatsoever about any prior offense.

Q. Would it be fair to say, then, that you didn't feel it was necessary to get an order, because you had already advised him not to make any such disclosures?

A. Yes.

Q. Now, you testified today that you had this discussion with Doctor Dimitris, and you outlined generally what you talked about. What you testified to, that's not everything that you all discussed, is it?

A. No. We talked for—I know it had to be over an hour, an hour, over an hour, and we talked about—different things, a lot of things. As I said, he gave me certain examples, which I can't recall now, and things along that nature.

[267] Q. You knew when the trial came up that both Doctor Pile and Doctor Dimitris would be called to testify by the Commonwealth?

A. Yes.

Q. You weren't surprised by their appearance?

A. No.

* * * *

[269] Q. Mr. Pugh, at the time of the appeal, I believe the record would show that you did not assign any grounds for error on the basis of the Fifth Amendment privilege in Doctor Pile's or Doctor Dimitris' examination of Mr. Smith.

A. That's correct.

Q. And do you have the reason that you can give the Court for why you did not make any such assignment of error?

A. Yes. We—in particular, in reference to the statements introduced by Doctor Pile and the [270] objections on that, we

did not feel that Virginia case law would support our position at that particular time. There was no immunity between what Doctor Pile said or testified to that I knew of at that time that we could claim. The law clerk, in fact, did some research on what we did. We had the various objections that we were going to raise to the Supreme Court of Virginia, sort of underlined each objection that we made during the course of the trial, thinking to make that an appealable point, and we didn't find—we didn't think at that time there was any merit to that particular claim.

* * * *

[273] REDIRECT EXAMINATION

BY MR. BONNIE:

Q. First, in connection with the question of preserving an objection to Doctor Pile's testimony concerning the bus incident on the Fifth Amendment grounds, you said that you didn't think you had anything under Virginia law to go on. Did you, in deciding what to do about that objection, research the Federal case law, Fourteenth Amendment case law on that question?

A. I did not.

Q. Do you know—are you aware that anyone, your research assistant or Mr. Wood, whether they had? Did you all discuss it?

A. We discussed it. Jim Updike and [274] myself, and he did do some research on it. Whether or not it was Federal case or not, I don't know, but I know the results of it was that it was a decision that—it wasn't—it didn't merit—

* * * *

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

MICHAEL MARNELL SMITH,

Petitioner

v.

EDWARD C. MORRIS,
SUPT. MECKLENBURG CORRECTIONAL CENTER,

Respondent

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Filed: April 16, 1980

On November 2, 1977, petitioner Michael Marnell Smith was convicted by a jury of capital murder following rape under Va. *Code Ann.* § 18.2-10(a) and -31(e) (Cum. Supp. 1977). On November 3, 1977, pursuant to the bifurcated capital trial proceedings prescribed by *Va. Code Ann.* § 19.2-256.2 *et seq.* (Cum. Supp. 1977), the jury recommended the sentence of death, which, after review, was imposed by this Court on November 30, 1977. The conviction and sentence were unsuccessfully appealed. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978); *cert. denied*, ____ U.S. ____, 99 S.Ct. 2419, (1979). On June 22, 1979, petitioner filed a writ of habeas corpus with this Court, alleging ineffective assistance of counsel during his trial. For the reasons set forth below, the petition is denied.

* * * *

I

Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made

during a pretrial psychiatric examination. On October 1, 1977, by order of this Court pursuant to petitioner's request for an evaluation by a psychiatrist of his own choosing, petitioner underwent a one-hour psychiatric examination by Dr. Wendell Pile. In a letter to this Court dated October 1, 1977, Dr. Pile described an account by petitioner of a previously undisclosed incident which occurred in his youth. The letter relates that petitioner, a school bus driver at the time, once tore the clothes off a girl, but on second thought, decided not to rape her. At the sentencing phase of the trial, petitioner's counsel objected to an attempt by the prosecution to elicit on direct examination this account by Dr. Pile on the grounds that during the examination Dr. Pile failed to inform petitioner that his statements could be used against him. This Court overruled, noting that Dr. Pile's examination occurred at petitioner's request.

Referring to the psychiatric examination itself, Dr. Pile at the beginning of said examination, encouraged petitioner to make a full disclosure of the offense and any prior offenses. Petitioner advised Dr. Pile that his attorney had told him not to discuss the offense or any prior offenses in which he had been involved. Thereafter, Dr. Pile did not press petitioner for information, but during the interview petitioner told Dr. Pile of the incident on the bus as recited above.

Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

Turning now to the case law discussed by petitioner in support of his first claim, petitioner refers to two recent decisions dealing with the issue raised. The first case, *Gibson* v. *Zahradnick*, 581 F.Ed 75 (4th Cir. 1978) overturns the decision in *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975),

in which Supreme Court of Virginia held that the prosecution may use on the issue of guilt statements made without prior warning during a psychiatric examination, so long as the accused was not compelled to answer questions concerning the offense with which he was charged. The court in *Gibson* v. *Zahradnick*, *supra*, disagreed, reasoning that an adequate evaluation of an accused's sanity at the time of the offense or of his competency to stand trial cannot be made absent a candid disclosure to the examiner of the facts surrounding the offense. Thus, the court held that in order to preserve his Sixth Amendment right to explore these psychological defenses, the incriminating statements an accused makes concerning the offense may not be used by the prosecution to prove his guilt. To adapt this holding to the present case, petitioner analogizes that proof of guilt in a normal criminal trial is the functional equivalent of the prosecution's proof of case-in-aggravation in the sentencing phase of a capital trial.

The second case, *Smith* v. *Estelle*, 602 F.2d 694 (5th Cir. 1979), involves the introduction of psychological testimony during the sentencing phase of a bifurcated capital trial. There, on the trial court's motion the prosecution obtained a psychiatric examination of the accused, but failed to inform him before or during the examination of his Fifth Amendment right against self incrimination. Having never disclosed the existance of this examination to the defense, the prosecution called the psychiatrist to testify on the issue of dangerousness in support of the state's case-in-aggravation. The court, *supra*, held the testimony inadmissible on two grounds: first, its introduction constituted unfair surprise, and second, in the absence of a warning against self-incrimination, the accused made no voluntary waiver of his Fifth Amendment rights.

Focusing on the merits of the first claim, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal. *Gibson* v. *Zahradnick*, *supra*, narrowly considers the admissibility of statements relating directly to the circum-

stances of the offense charged, and their use by the prosecution to prove guilt. It does not consider the use of statements to prove mental state, nor does it draw the analogy between proof of guilt and proof of case-in-aggravation.

Further, since unfair surprise is not in issue in the present case, *Gibson* v. *Zahradnick* forecloses further argument based on *Smith* v. *Estelle*, *supra*. The alternative analysis employed in *Smith* v. *Estelle* with regard to the admissibility of incriminatory statements is the same Fifth Amendment voluntariness of waiver analysis that the Supreme Court of Virginia employed in *Gibson* v. *Commonwealth*, *supra*, and which was ultimately rejected in *Gibson* v. *Zahradnick*. The court in *Gibson* v. *Zahradnick* reasoned instead that the Sixth Amendent right to explore psychological defenses demands a full inquiry, uncompromised by the threat of self incrimination, into defendant's mental state. The court's holding that the prosecution is prohibited from using such incriminatory statements to prove defendant's guilt was based on a finding that defendant's Sixth Amendment rights were violated, and not on a finding of absence of voluntary waiver.

More importantly, however, both *Gibson* v. *Zahradnick* and *Smith* v. *Estelle* were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. Further, testimony shows that an assistant of counsel conducted research on the Fifth Amendment issue, but that his unpromising results led counsel to decide not to appeal. [Evidentiary hearing tr. at 270 and 274.] In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection of appeal, and that this decision resulted from informed, professional deliberation in conformity with the standards of competence discussed above.

In other claim relating to statements made during the psychiatric examination, petitioner contends that his counsel

incompetently failed to recognize the conflicts between his advice to petitioner to remain silent about the offense charged and his attempt through psychiatric examination to explore possible psychological defenses. Petitioner's claim presumes that such defenses cannot be probed in the absence of statements by the accused concerning the circumstances surrounding the offense. On this issue, the opinions of expert witnesses were in opposition [Evidentiary hearing tr. at 80 and 180-182], as appear to be the underlying presumptions in the decisions of *Gibson* v. *Zahradnick* and *Smith* v. *Estelle*, discussed *supra*. I find adequate support for counsel's conduct within the present state of disagreement, both in the medicial and legal professions, on this matter. I thus conclude that counsel's advice to petitioner to remain silent about the offense during his psychiatric examinations was not inadequate representation under the *Slayton* or *Marzullo* standards quoted above.

* * * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CASE NO. 82-484-N
Filed June 30, 1982

MICHAEL MARNELL SMITH,
Petitioner

v.

EDWARD C. MORRIS, Superintendent,
Mecklenburg Correctional Center
Post Office Box 500, Boydton, Virginia 23917,
Respondent

PETITION FOR A WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the Petitioner, Michael Marnell Smith, by his counsel, and represents unto the Court that he is illegally held, under sentence of death, in the custody, confinement and restraint of the Respondent and his agents and employees, at the Mecklenburg Correctional Center of the Virginia Department of Corrections, located in Boydton, in the County of Mecklenburg, Commonwealth of Virginia, and that his confinement under sentence of death is illegal for the reasons set forth below. The jurisdiction of their Court is invoked pursuant to 28 U.S.C. § 2254.

* * * *

IV. THE INTRODUCTION BY THE PROSECUTION OF INCRIMINATING AND ADVERSE PSYCHIATRIC TESTIMONY ON THE ISSUE OF PETITIONER'S FUTURE DANGEROUSNESS AT HIS CAPITAL SENTENCING TRIAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

44. By order dated July 1, 1977, Petitioner was ordered to undergo psychiatric evaluation by Dr. James C. Dimitris and the staff of the Forensic Unit of Central State Hospital, employees of the Virginia Department of Mental Health and Mental Retardation. Pursuant to this order, Petitioner was hospitalized from July 5, 1977, to August 23, 1977.

45. By order dated September 28, 1977, Petitioner was ordered to undergo psychiatric evaluation by Wendell J. Pile, M.D., a private psychiatrist appointed by the Court, this examination being conducted on October 1, 1977.

46. Petitioner was not told by Dr. Pile before or during his examination that his statements during the examination could be used against him at either the guilty or capital sentencing phase of his trial.

47. Petitioner was not told by either Dr. Dimitris or Dr. Pile before or during their respective examinations that he had a right to consult with his counsel and/or to have counsel present during the examination.

48. Petitioner was not told by either Dr. Dimitris or Dr. Pile before or during their respective examinations that he had a right to remain silent concerning the alleged offense with which he had been charged or any prior criminal offenses.

49. Petitioner was not told by either Dr. Dimitris or Dr. Pile before or during any clinical interviews that he had a right to terminate the interview at any time.

50. No circumstances pertaining to either evaluation provided notice to Petitioner that these examinations had any

adversarial purpose or that his statements to Dr. Pile or Dr. Dimitris or the staff of Central State Hospital could form the basis of, or be used as evidence to support, a determination that he should be put to death.

51. Both Dr. Pile and Dr. Dimitris encouraged Petitioner to disclose the details of the offense for which he had been indicted and the details of any prior criminal conduct whether or not such conduct had led to any conviction.

52. On the basis of their respective examinations and as required by court orders, Dr. James Dimitris and Dr. Wendell J. Pile sent reports, dated August 8, 1977, and October 1, 1977, respectively, to the Circuit Court of Williamsburg and James City County, with copies to the Commonwealth's Attorney and Petitioner's trial attorneys.

53. Petitioner did not plead "not guilty by reason of insanity" or attempt to introduce any psychiatric evidence at the guilt phase of his trial for capital murder.

54. After Petitioner was convicted of capital murder, Petitioner's trial attorneys did not intend to call Dr. Wendell J. Pile as a witness on Petitioner's behalf at the capital sentencing phase of his trial.

55. At the capital sentencing phase of Petitioner's trial on November 3, 1977, the Commonwealth called Dr. Wendell J. Pile as its witness and, on direct examination and over Petitioner's objection, Dr. Pile was permitted to testify about statements made by Petitioner during the examination described in paragraph 45, above, concerning episodes of alleged anti-social behavior which had not previously been disclosed to the jury.

56. Although Petitioner's trial attorneys were prepared to call Dr. James Dimitris as a witness on Petitioiner's behalf at the capital sentencing phase of his trial, the scope of such testimony would have been restricted to Dr. Dimitris' diagnosis of Petitioner's psychological abnormality and the degree to which any such abnormality impaired his ability to control his behavior or appreciate the wrongfulness of his conduct.

57. At the capital sentencing phase of Petitioner's trial on November 3, 1977, the Commonwealth called Dr. Dimitris as its witness and he was permitted to testify regarding the likelihood that Petitioner would engage in serious criminal acts of violence in the future.

58. Petitioner was unwittingly induced to provide, by his own statements, the only evidence offered by the prosecution, other than his record of prior conviction and the circumstances of the present offense, which purported to suggest that he might be dangerous in the future and should therefore be put to death.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION 82-484-N
Filed March 6, 1984

MICHAEL MARNELL SMITH #113176,
Petitioner,

v.

RAYMOND K. PROCUNIER, Director of the
Virginia Department of Corrections,
Respondent.

MAGISTRATE'S PRELIMINARY REPORT

* * * *

IV

Petitioner next asserts that the introduction by the prosecution of incriminating and adverse psychiatric testimony on the issue of petitioner's future dangerousness at his capital sentencing trial violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments. See Appendix, paragraphs 26 and 44-58, pages 12-14, for a complete statement of grounds under this heading.

These grounds were not raised on direct appeal nor were they addressed on the merits by the Supreme Court of Virginia. Consequently, it is concluded that the issues raised under this heading are subject to the doctrine of procedural default.

Even though all claims under this heading were asserted in petitioner's state court habeas corpus petition, the state habeas trial court specifically declined to address any allegations under this heading precisely because the allegations had

not been raised at trial and were therefore "waived and forfeited."

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 82-484-N

MICHAEL MARNELL SMITH,

Petitioner(s),

v.

RAYMOND K. PROCUNIER, Director of the
Virginia Department of Corrections,

Respondent(s).

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision having been duly rendered,

It is ADJUDGED and ORDERED that this action be dismissed.

W. FARLEY POWERS, JR., Clerk

/s/ ANN F. RIVES
Ann F. Rives, Deputy Clerk

Date: December 4, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 82-484-N

MICHAEL MARNELL SMITH,

Petitioner

v.

RAYMOND K. PROCUNIER, Etc.,

Respondent

ORDER

This matter was initiated by a petition for writ of habeas corpus under 28 U.S.C. § 2254.

The petition alleges violations of federal rights pertaining to Mr. Smith's conviction for capital murder on November 30, 1977 in the Circuit Court of the City of Williamsburg and County of James City, as a result of which petitioner was sentenced to death.

This matter was referred to a United States Magistrate for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 29(A)(1) and (N)(3)(f) of the Rules of the United States District Court for the Eastern District of Virginia. The magistrate filed three preliminary reports on March 6, 1984, March 30, 1984 and April 9, 1984, respectively, dealing with various aspects of the petition. A final report of the magistrate, incorporating the preliminary reports, was filed on August 31, 1984. The final report recommended dismissal of the petition. By copy of the final report, each party was advised of his right to file written objections to the findings and recommendations made by the magistrate.

The Court received from petitioner's counsel Exceptions to Magistrate's Reports filed on September 17, 1984. The Court having examined petitioner's exceptions and having made *de*

novo findings with respect to the portions objected to, does hereby adopt and approve, with the one exception discussed below, the findings and recommendations set forth or incorporated in the final report of the United States Magistrate filed August 31, 1984. It is, therefore, ORDERED that the petition be DENIED and DISMISSED and that judgment be entered in favor of the respondent.

This Court's only point of divergence from the Magistrate's findings stems from the Magistrate's reluctance to follow *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983) on an issue regarding procedural default. Although the Magistrate acknowledged in his third report that *Carrier* supported petitioner's position on a question of procedural default, he found *Carrier's* future application unclear and held that the case would not be followed in this matter. The Magistrate felt it the better course of action to follow what he deemed was the Supreme Court's stance on this issue, as deduced from *Engle* v. *Issac*, 456 U.S. 107, 129-35 (1982). As set forth below, this Court finds that even analyzing all of petitioner's applicable claims under *Carrier*, they remain barred by procedural default.

Carrier v. *Hutto*, *supra*, held that attorney error short of wholesale ineffectiveness of counsel can satisfy the "cause" prong of the "cause and prejudice" test defined in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), provided that the act or omission causing the procedural default emanated from ignorance or inadvertence, rather than deliberate strategy. *Carrier*, 724 F.2d at 401. *Carrier's* holding primarily addresses trial objections mistakenly omitted on appeal, or appellate claims which should have been, but were not, raised.

Petitioner's procedurally defaulted claims do not fall under the *Carrier* exception. Petitioner's barred claims involve, for the most part, challenges by his habeas counsel to the Virginia capital punishment statute and its sentencing procedures which were not raised by petitioner's original counsel at his trial and direct appeal. Specifically these claims are: (1) the Virginia capital sentencing procedure is unconstitutional on its

face and as applied under the Eighth and Fourteenth Amendments (heading I); (2) application of the statute in his case gave presumptive effect to the jury's finding of either of two statutory aggravating circumstances and devalued his mitigating evidence, thereby depriving him of his right under the Eighth and Fourteenth Amendments to an individualized determination (heading II); (3) application of the present Virginia death penalty procedures have resulted in an arbitrary and discriminatory pattern of imposing the death penalty (heading III); (4) the procedures for appointing and compensating indigent counsel for capital defendants create a substantial likelihood that such defendants' Sixth and Fourteenth Amendment rights will be violated (heading VI); (5) imposition of the death penalty by electrocution is unnecessarily cruel and thus forbidden by the Eighth and Fourteenth Amendments (heading IX); and (6) the death penalty is excessive punishment in petitioner's case (heading X). Petitioner's other procedurally barred claim involves the admission of psychiatric testimony at his sentencing (heading IV). That claim is clearly barred under *Wainwright* and *Carrier*, because as stated at petitioner's state court habeas proceeding, the default resulted not from the trial attorney's ignorance or inadvertence, but because of a deliberate tactical decision. *See Wainwright*, 433 U.S. at 77, 82-83, 85; *Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963); *Carrier*, 724 F.2d at 401.

Returning to petitioner's above numbered contentions, while these claims are hardly frivolous, they are not the type of omissions to which *Carrier* speaks. Furthermore, the claims are not so novel that their legal basis was not reasonably available to petitioner's original counsel, nor has there been a recent Supreme Court reversal of earlier cases dealing with these issues which would constitute cause for their not being raised at trial and on direct appeal. *See Reed* v. *Ross*, 104 S.Ct. 2901 (1984).

Even if one could somehow find that the failure of petitioner's original counsel to raise the above numbered claims constituted

attorney omission satisfying the "cause" requirement under *Carrier*, there is no indication that omission of these claims satisfies the "prejudice" requirement enunciated in *Wainwright* v. *Sykes*, *supra*. To satisfy the prejudice exception there must be actual, not possible, prejudice resulting in "actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions. *United States* v. *Frady*, 456 U.S. 152, 170 (1982). In light of the overwhelming evidence of petitioner's guilt and the jury's careful deliberation over his sentence, the failure of petitioner's original counsel to raise these issues did not result in actual prejudice satisfying the *Wainwright* requirement. As an aside, this Court notes that virtually all of these issues have been raised by previous habeas petitioners, and have been dismissed on the merits. *See e.g. Briley* v. *Bass*, 584 F.Supp. 807, 819 (E.D. Va. 1984) (Virginia death penalty statute constitutional) *aff'd* No. 84-6243 (4th Cir., August 23, 1984).

The Court therefore concludes that even under *Carrier* v. *Hutto*, *supra*, petitioner's claims remain procedurally barred. Accordingly, to the extent that the petition is based on claims set forth in its paragraphs numbered 23 and 33 (under heading I), paragraphs 24 and 36 (under heading II), paragraphs 27 and 59 through 73 (under heading V), paragraphs 29, 82 and 83 (under heading VII), and paragraphs 30, 69 and 90 (under heading VIII), it is DISMISSED on the merits.

To the extent that the petition is based on any other claims, it is DISMISSED on the basis of petitioner's procedural defaults in the state courts.

Petitioner may appeal from this *final order* by filing a *written* notice of appeal with the Clerk of this Court, Room 307, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from this date. For the reasons stated or incorporated in said final report to the Magistrate, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of probable cause for appeal.

/s/

United States District Judge
Norfolk, Virginia
December 4th, 1984.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-4001

MICHAEL MARNELL SMITH

Appellant,

v.

RAYMOND K. PROCUNIER, Director
of the Department of Corrections,

Appellee.

Appeal From The United States District Court For The Eastern District Of Virginia, At Norfolk. John A. MacKenzie, Chief Judge. (CA 82-484-N)

Argued: April 5, 1985 Decided: May 10, 1985

Before WIDENER and MURNAGHAN, Circuit Judges and WARRINER, United States District Judge for the Eastern District of Virginia, sitting by designation.

MURNAGHAN, Circuit Judge:

It has not infrequently been observed that there must be a better, more expeditious, way for dealing with cases which present the most stressful and distressful decisions with which a judge or panel of judges may be faced, namely, those involving appeals from denials of *habeas corpus* relief to criminal defendants convicted and sentenced to die. The offense here occurred on May 23, 1977. Michael Marnell Smith was convicted by a jury in James City County, Virginia on November 2, 1977 for the capital murder and rape of a young woman. On the following day, November 3, 1977, the jury heard evidence at the penalty/sentencing phase and recommended a sentence of

death. In doing so, the jury had before it the Commonwealth's claim that there were two separate aggravating circumstances, one of dangerousness, the other of vileness. The jury found separately, with respect to each aggravating circumstance, that it alone merited imposition of the death penalty.

There followed the usual panoply of legal maneuvers:

1. An automatic appeal to the Supreme Court of Virginia, which affirmed the conviction and the death sentence. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978).

2. A denial by the Supreme Court of the United States of a petition for a writ of certiorari. *Smith* v. *Virginia*, 441 U.S. 967 (1979).

3. A denial of a state court petition for writ of *habeas corpus* on March 14, 1980 following an evidentiary hearing on Smith's claim that there had been ineffective assistance of counsel.

4. The filing, on June 28, 1982, of a petition in the United States District Court for the Eastern District of Virginia for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. A magistrate issued a written report proposing dismissal of the petition. On December 4, 1984 the district court did so.

Now, on appeal, the case reaches us on the following issues:

1. Whether a Fifth Amendment violation occurred when a psychiatrist, consulted at the instance of Smith's counsel, was wrongly permitted to testify in the sentencing phase of the case about incriminating statements concerning an earlier attack Smith described during the psychiatric interview.

2. Whether the assistance of counsel representing Smith at the sentencing phase was ineffective.

3. Whether jury instructions at the sentencing phase unconstitutionally compromised Smith's right to an individualized determination that death was the appropriate punishment.

It is evident that guilt is not contested. Smith questions solely the correctness of the sentencing procedures.

At the outset we are confronted with a contention by the Commonwealth that the absence of an objection by counsel to the psychiatric testimony under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) foreclosed the making of the point. The case imposes a burden on the convict to show cause for and prejudice in the failure to raise the issue.

That question under *Wainwright* v. *Sykes* has plagued the Court in prior instances. Potentially it could do so here for there is reason to doubt whether counsel for Smith could muster sufficient reason to constitute trial counsel's failure to object inexcusable neglect. The testimony of a psychiatrist whose interview with Smith took place through the initial urging of defense counsel was under Virginia law proper, even though his testimony was severely damaging to the defendant. *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975). At the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November 1977, was not certain. Only subsequently, in *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), did the Fourth Circuit establish the impropriety on Fifth Amendment grounds of testimony concerning damaging remarks of the accused during a psychiatric examination.[1]

One difficulty is presented by the case of *Honeycutt* v. *Mahoney*, 698 F.2d 213 (4th Cir. 1983). There it was held that a lawyer could not be found to have afforded ineffective assistance where in October 1973 he failed to object to imposition on the defendant of the burden of proof. That the imposition was, indeed, improper was finally established by the Supreme Court in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The

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[1] That is not to say, however, that there were not indicia of things to come which antedated the trial of Smith. *E.g.*, *United States* v. *Albright*, 388 F.2d 719 (4th Cir. 1968); *Gibson* v. *Zahradnick*, *supra*, at 78-79.

Supreme Court's decision came down two years after the trial had taken place. However, both the district court on September 29, 1972 and the decision of the First Circuit Court of Appeals on February 14, 1973 had announced the same rule of law, subsequently adopted by the Supreme Court, *before* trial took place in October 1973.[2]

Rather than take such an approach here, however, especially inasmuch as the continued vitality of *Honeycutt* v. *Mahoney* has been rendered uncertain by the recent decision of *Reed* v. *Ross*, ___ U.S. ___, 82 L.Ed.2d 1, 52 U.S.L.W. 4905 (1984), we give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue raised on the merits.[3]Since our determination on the merits is that Smith is not entitled to *habeas corpus* relief, we thereby, without displaying substantial disregard for *Wainwright* v. *Sykes*, at least, avoid the nagging concern that one possibly meritorious grounds for avoiding the termination of Smith's life went unconsidered. *Cf. Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983), holding that ignorance or oversight leading to the failure to raise a point on behalf of a criminal defendant may constitute cause sufficient to excuse failure to make a contemporaneous objection.[4]

On the merits, we immediately come up against the consideration that the jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (*i.e.*, violence) and (b) vile-

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[2] *Wilbur* v. *Robbins*, 349 F. Supp. 149 (S.D. Me. 1972); *Wilbur* v. *Mullaney*, 473 F.2d 943 (1st Cir. 1973).

[3] *See Hutchins* v. *Woodard*, 730 F.2d 953, 959 (4th Cir. 1984).

[4] At the same time, we feel it only fair to counsel who represented Smith to point out that the question is very clouded as to whether the representation he afforded his client was, in fact, ineffective or that any prejudice resulted. *See Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984).

ness.[5] The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness."[6] The evidence presented to the jury supporting a showing of "vileness" was unchallenged. The testimony in the guilt phase of the case amply provided a basis for a decision that the crime was vile.[7] Having met the victim on a beach, Smith paused to help remove briars from her feet. The appearance of kindness immediately dissipated when Smith grasped the victim's arm, took her to a wooded area, produced a knife, and told her to undress. He then forced her to have intercourse and, following that, choked her, dragged her into the water, submerged her head, stabbed her, and left the dead victim lying where she fell. The immediate cause of death was drowning, although the testimony indicated that stab wounds and strangulation also could have been responsible.

This court recently decided in *Briley* v. *Bass*, 742 F.2d 155, 165 (4th Cir. 1984), that any one aggravating circumstance deemed sufficient by the jury suffices:

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[5] In the jury's verdict, the chameleon word "or" separates the finding of "probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society" from "his conduct in committing the offense is outrageously or wantonly vile." Any possible ambiguity is removed for us, however, by the determination of the Supreme Court of Virginia that "[t]he written verdict recited a finding of both aggravating circumstances." *Smith* v. *Commonwealth*, 219 Va. 455, 481, 248 S.E.2d. 135, 151 (1978). *Cf. Briley* v. *Bass*, 750 F.2d 1238 (4th Cir. 1984) where "shall" from the context was read as "may." Similarly, the context removes any doubt that "or" meant, and was understood to mean, "and."

[6] The psychiatrist testified that Smith volunteered information that at some time prior to the incident for which he here stood convicted he assaulted a girl on a school bus.

[7] In his instruction, the trial judge defined vile as torture, depravity of mind or aggravated battery to the victim.

> [S]ince the jury returned a verdict finding the death sentence warranted under both the "vileness" and the "dangerousness" standard, it is of no importance whether the instruction on "vileness" was correct so long as the instruction on "dangerousness" was correct, provided, of course, the verdict of the jury was unanimous on the "dangerousness ground."

Similarly, the Supreme Court in *Zant* v. *Stephens*, 462 U.S. 862, 884 (1983) stated that:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravated circumstance is "invalid" in the sense that it is insufficient itself to support the death penalty.

The effort is also made to depict Smith's trial counsel as ineffective for failure, having once elicited testimony that Smith was a sociopathic personality, subject to sexual deviation, to explore with two psychiatrists who testified the possibility that Smith suffered from a potentially mitigating mental incapacity. First, inquiry into the area meant resort to a double-edged sword, requiring the application of professional judgment whether to pursue a subject that already had proved unproductive. Second, counsel's professional wisdom in deciding not to do so was borne out because both psychiatrists have (at the state *habeas corpus* hearing) indicated that, had they been asked an opinion as to whether Smith suffered from a potentially mitigating mental incapacity, the answer in each case would have been negative.

Finally Smith's constitutional challenge to jury instructions at the sentencing phase as having deprived him of his Eighth Amendment right to an individualized determination that death was the appropriate penalty, *see Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978), runs up against contrary authority which is controlling. The constitutionality of the instructions of which Smith complains has been upheld by *Smith* v. *Commonwealth*, 219 Va. 455, 480, 248 S.E.2d 135, 150 (Va. 1978). Furthermore, in considering a similar instruction under the same Virginia statute, this court recently ruled that the instruction was not

constitutionally defective. *Briley* v. *Bass*, 750 F.2d 1238 (4th Cir. 1984). In the instant case, the language focused on as allegedly erroneous is: "if you find that other mitigating circumstances do not justify a sentence of death, you may fix the defendant's punishment at life imprisonment."[8] *Briley* v. *Bass* concluded that inclusion in the jury charge of "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life imprisonment" left the instruction free of constitutional error.

The messages conveyed to the juries in the two cases are not substantially different in meaning. The refutation of the appellant's contention in *Briley* v. *Bass* dictates the same result here. The use in the instant case of "may" instead of "shall" does not overcome the consideration that reading the instructions as a whole makes it altogether apparent that a finding that other mitigating circumstances did not justify a sentence of death necessitated rejection of the death penalty. Just as consideration of all the circumstances in *Briley* v. *Bass* converted "shall" to "may" in the statement "you shall fix the punishment of the defendant at death," so here "may" should be read as "shall."

Accordingly, we conclude that the action of the district court in dismissing the petition for a writ of *habeas corpus* should be, and it hereby is, affirmed.

Since execution is fixed for May 15, 1985, we grant a stay for a period of twenty-one (21) days from the filing of this opinion to permit the petitioner to apply to the Supreme Court or a Justice thereof for a further stay.

AFFIRMED.

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[8] A related instruction read: "that when determining the punishment to be imposed . . . you shall consider . . . any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to the following. . . ."

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-4001

Filed: June 26, 1985

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Widener and Judge Warriner, United States District Judge sitting by designation.

For the Court,

JOHN M. GREACEN
CLERK

SUPREME COURT OF THE UNITED STATES

No. 85-5487

MICHAEL MARNELL SMITH,

Petitioner

v.

ALLYN R. SIELAFF, Director, Virginia Department of Corrections

---

ORDER ALLOWING CERTIORARI. Filed October 21, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, limited to Questions 1 and 2 presented by the petition.

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S BRIEF

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*J. LLOYD SNOOK, III
230 Court Square
Charlottesville, Virginia 22901
804-293-8185

RICHARD J. BONNIE
University of Virginia School of Law
Charlottesville, Virginia 22901

**Counsel of Record*

Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

1. When a court orders a pretrial mental evaluation of a capital defendant upon defense request to enable counsel to explore psychiatric defenses or claims in mitigation, is it constitutionally permissible for the prosecution to call the expert to testify about incriminating statements made by defendant during the evaluation when the statements are offered for the sole purpose of proving an aggravating circumstance and are not relevant to any claim in mitigation raised by the defense?

2. When constitutionally inadmissible testimony derived from a pretrial mental evaluation is introduced by the state to prove an aggravating circumstance at a capital sentencing proceeding, and the record reveals a substantial likelihood that the inadmissible evidence influenced the jury's decision to impose a death sentence, are the federal courts nonetheless obligated by this Court's decision in *Zant* v. *Stephens* to ignore the constitutional error and uphold the death sentence simply because the state proved another statutory aggravating circumstance that was untainted by the error?

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OPINION BELOW

The opinion of the Fourth Circuit below is *Smith* v. *Procunier*, 769 F.2d 170 (4th Cir. 1985).

ASSIGNMENT OF ERROR

The Fourth Circuit erred in holding that even if Dr. Pile's testimony was constitutionally inadmissible, Smith's death sentence was constitutionally valid under this Court's decision in *Zant* v. *Stephens* because the error did not taint every aggravating circumstance found by the jury.

JURISDICTION

The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The Virginia statute that states the substantive predicates for imposition of the death sentence is *Va. Code Ann.* § 19.2-264.2 (Repl. Vol. 1983):

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

According to *Va. Code Ann.* § 19.2-264.4(B), mitigating evidence may include, but shall not be limited to, the following:

> (i) The defendant has no significant history of prior criminal activity, or
>
> (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or

(iii) the victim was a participant in the defendant's conduct or consented to the act, or

(iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or

(v) the age of the defendant at the time of the commission of the capital offense.

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, which are set out, in pertinent part, as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

U.S. CONST. AMEND. V.

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Michael Marnell Smith was convicted and sentenced to death for the rape and murder of Audrey Weiler on May 23, 1977. He was tried by a jury in a trial beginning on October 31, 1977, and he was found guilty of November 2, 1977. After a sentencing hearing held on November 3, 1977, the jury returned with a recommendation of death. Judge Russell M. Carneal, Judge of the Circuit Court for the City of Williamsburg and the County of James City, imposed the death sentence on November 30, 1977.

The Supreme Court of Virginia affirmed the conviction and sentence in *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

Smith then filed a Petition for Writ of Habeas Corpus in the Circuit Court for the City of Williamsburg and the County of James City seeking to set aside his death sentence on nine grounds; the petition did not challenge the legality of Smith's conviction. An evidentiary hearing on Smith's claim that he had been denied effective assistance of counsel was held on November 8, 1979. Judge Carneal denied the Petition for Writ of Habeas Corpus by order dated April 16, 1980. Smith's Petition for Appeal to the Virginia Supreme Court of Virginia was denied, and his Petition for Writ of Certiorari was also denied. *Smith* v. *Morris, cert. denied*, 454 U.S. 1128 (1981).

Smith then filed his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Virginia. The case was referred to a magistrate, but no new factual matters were developed. The District Court followed the recommendation of the magistrate with only one minor change, and dismissed the Petition on December 4, 1984.

An appeal was then taken to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit affirmed on May 10, 1985. *Smith* v. *Procunier*, 769 F.2d 170 (4th Cir. 1985). A Petition for Rehearing or Rehearing En Banc was denied on June 26, 1985. This Court granted certiorari on October 21, 1985. *Smith* v. *Sielaff*, 106 S.Ct. 245 (1985).

STATEMENT OF FACTS

According to his confession, Michael Smith met Audrey Weiler on a beach near his home when he stopped to help her remove briars from her feet. He then grasped her arm and walked with her to a wooded area near the water, pulled out a knife and asked her to take off her clothes. She complied, while protesting. Smith, using a condom, had intercourse with Mrs. Weiler and then started choking her with both hands. He dragged her into the water and submerged her head for several seconds. He subsequently stabbed her in the back with the knife. He left the body and returned home. The medical examiner concluded that the immediate cause of death was drown-

ing, though the stab wounds and the strangulation could also have caused death.

Two days after the offense, investigators came to the Gospel Spreading Church Farm, the family farm where Smith lived and worked. When he was confronted with the investigators' suspicions, Smith asked for a Bible. His brother brought a Bible, and Smith and the investigators knelt and prayed. Smith then gave his confession.

Pretrial Psychiatric Examinations

On May 26, 1977, David F. Pugh was appointed to represent Smith; he immediately asked that Smith be examined to determine whether he was competent to stand trial. The examination was conducted by Dr. Palmaz, who stated that, in his opinion, Smith was competent to stand trial.

The circumstances of the offense and the prospect of a death sentence led Pugh to seek more comprehensive psychiatric evaluations of Smith in order to explore the availability of psychiatric defenses to the charges, and, especially, of claims in mitigation based on psychopathology. He first requested the Court to order Smith committed to Central State Hospital. This order was entered on July 1, 1977 and Smith was hospitalized for evaluation from July 5, 1977 to August 23, 1977. Dissatisfied with the results of the Central State evaluation, Pugh subsequently requested the trial court to appoint a private psychiatrist, Dr. Wendell J. Pile, to examine him. This order was entered on September 28, 1977, App. 1, and Smith was examined at Dr. Pile's office on October 1, 1977.

Under a decision of the Virginia Supreme Court then in force, statements made by the defendant during a pretrial psychiatric evaluation could be used affirmatively by the prosecution to prove the elements of its case. *Gibson* v. *Commonwealth*, 216 Va. 412 (1975). Moreover, the standard practice in cases involving any court-ordered evaluation, whether requested by the defense or the prosecution, was for the examiner to send copies of the report to the court, the prosecution and the defense attorney. Drs. Dimitris and Pile were both

explicitly directed to do so in the respective court orders directing them to examine Smith.

Mr. Pugh had advised Smith not to discuss the offense with which he was charged or any prior offenses with anyone other than himself and co-counsel. At the outset of the Central State evaluation, Dr. James Dimitris, Chief Psychiatrist on the Forensic Unit, warned Smith that anything he said during the evaluation could "be used one day against you in a court of law." App. 113. Throughout the evaluation, however, he inquired about Smith's criminal behavior and told Smith that it would be "helpful" if Smith discussed these matters and Smith did so. App. 117. Dr. Pile said nothing to Smith before or during his evaluation regarding the purposes of the evaluation or the uses to which the information could be put. In particular, he did not advise Smith that a copy of his report would be sent to the prosecution and that his statements could be used against him by the prosecution. App. 90.

In his letter to the court and counsel, dated October 1, 1977, Dr. Pile reported that Smith had "said he came close to [raping] a girl who was riding the school bus he was driving, but after he tore her clothes off he thought better of it and did not do so." This incident, which had occurred, according to Smith, at least 13 years earlier when he was a teenager, had not led to any arrest and was not previously known either to defense counsel or to the Commonwealth. Dr. Pile also noted his diagnostic impressions as "sociopathic personality; sexual deviation (rape)." App. 45.

The Sentencing Hearing

At the sentencing hearing, the prosecution put on four witnesses. First, Dr. Pile was called to tell the jury what Petitioner had told him about the school bus incident.

Q. Did he tell you anything about the girl on the school bus?

A. He did.

Q. What did he say about that?

At this point, Mr. Pugh objected.

> Your Honor, we're going to object to any testimony made by Dr. Pile with respect to a case involving or an incident involving the Defendant at sometime prior to the offense for which he's charged . . . as well as the fact that—I think that the Commonwealth has to lay the foundation as to what the Doctor instructed Mr. Smith with respect to his rights to say anything to him.

App. 4.

Judge Carneal overruled the objection, noting that evidence concerning Smith's prior history was relevant and that Dr. Pile had examined Smith at defense counsel's request:

> You, having done this, and Mr. Smith having talked to him, I don't believe that Dr. Pile has any duty to inform him that anything he may say to him may be used for or against him in a court of law, as a police officer does under the *Miranda*.

App. 5.

Dr. Pile was permitted to answer the question.

> A. He explained that he was driving a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.
>
> Mr. Person: that's all the questions I have.

App. 6.

At the state habeas hearing, Mr. Pugh testified that he would not have called Dr. Pile to testify because he "did not feel his testimony would benefit Mr. Smith" and that he knew that Pile's diagnosis "would have been harmful ." App. 137. He also felt that Dr. Pile's evaluation had been too brief to support the diagnosis. Nonetheless, after the prosecution had asked Dr. Pile about the school bus incident, Pugh asked about his diagnosis:

> Q. Dr. Pile, in your diagnosis, what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopathic personality, sexual deviation, rape.

> Q. What is that?
>
> A. A person who—is also described as an antisocial personality. They're all sort of the same type of—of personality disorder. The basically [sic] people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of—of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

App. 7.

In his testimony at the state habeas hearing, Mr. Pugh was unable to explain why he asked Dr. Pile about his diagnosis. App. 138-39.

The second Commonwealth witness was Dr. James C. Dimitris, forensic psychiatrist at Central State Hospital, who testified that Smith was competent to stand trial and legally sane at the time of the offense. On cross-examination, defense counsel asked Dr. Dimitris for his diagnosis of Smith. During Dr. Dimitris' testimony, two jurors asked him to explain the difference between his diagnosis ("inadequate personality disorder") and Dr. Pile's diagnosis ("sociopathic personality disorder"), referring particularly to the implications for successful treatment. App. 17-21.

The prosecution also called Smith's Parole Officer, Frederick Toepke, who testified about Smith's prior rape conviction, and Investigator Fred Dunford, who again read Smith's confession.

The defense recalled Mr. Toepke to testify that Smith had no criminal record other than the 1973 rape charge, and then called twelve character witnesses and Smith's parents, all of whom gave very brief testimony to the effect that Smith had been a regular churchgoer, a member of the choir, a good bus driver, a conscientious student at Bruton High School, and a good soldier in Vietnam. His parents also testified about life on the family-owned Gospel Spreading Farm.

In its closing argument, the prosecution relied on Dr. Pile's description of the school bus incident, as well as Dr. Pile's

diagnosis, to support its claim that Smith would be a continuing threat to society and that a death sentence was necessary to incapacitate him. App. 31-33.

After receiving the court's instructions, the jury began to deliberate. Two hours later, the jury returned "to request the definition of the term 'life imprisonment' with respect to [the defendant's] eligibility for parole during said life sentence." Transcript 1096. The court declined to answer the question, directing the jurors "to impose such punishment as you consider to be just under the evidence and within the limits stated in the court's instructions" and "not to concern yourselves with what may afterwards happen." Two hours later, the jury returned a death sentence. The jurors found both of the statutory aggravating circumstances—i.e. that "there is a probability that [Smith] would commit criminal acts of violence that would constitute a continuing serious threat to society" and that his "conduct in committing the offense [was] outrageously or wantonly vile, horrible or inhuman, in that it involved torture and aggravated battery to the victim." The jury struck the language "depravity of mind" from the second circumstance. App. 39.

Direct Appeal

Smith's death sentence was affirmed by the Virginia Supreme Court. Defense counsel did not assign as error on direct appeal the admission of Dr. Pile's testimony. Although the issue was discussed in an Amicus Brief filed by the Post-Conviction Assistance Project of the University of Virginia School of Law, the Virginia Supreme Court expressly refused to consider arguments of amicus "not comprehended by the assignments of error." After briefs had been submitted but before argument on the appeal, the Fourth Circuit decided *Gibson* v. *Zahradnick*, 581 F.2d 75, 80 (4th Cir. 1978), overturning the Virginia Supreme Court's 1975 decision in *Gibson* v. *Commonwealth* and holding that "an incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination and whether it was had for the

purpose of determining competency to stand trial or sanity [at the time of the offense]."

At the state habeas hearing, Mr. Pugh testified that he did not assign the admissibility of Dr. Pile's error because he did not think the claim had any merit under Virginia law. App. 143. However, he stated that he had not personally researched the issue, that he was unfamiliar with pertinent decisions of the federal courts, and was unsure whether the law student who had assisted the defense had researched the federal case law. Id.

Collateral Proceedings and the Decision Below

Smith alleged in both his state and federal habeas petitions that Dr. Pile's testimony at the sentencing proceeding was constitutionally inadmissible. Both the state habeas court and the federal district court ruled that the claim had been forfeited, on grounds of procedural default, because Mr. Pugh had failed to raise the issue on direct appeal to the Virginia Supreme Court. Smith has argued that the federal courts should address the merits of the claim, notwithstanding the procedural default, because Pugh's failure to raise the issue on appeal was attributable to ignorance or neglect rather than informed professional deliberation. *See Carrier* v. *Hutto*, 724 F.2d 396 (1983), *aff'd en banc*, 754 F.2d 520, *cert. granted sub nom. Carrier* v. *Sielaff*, 105 S. Ct. 3523 (1985) (interpreting the "cause" requirement of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977)).

In its decision below, the Fourth Circuit chose to address the merits of Smith's claim, assuming without deciding that Smith had demonstrated sufficient "cause" for the procedural default to warrant federal review. On the merits, the Fourth Circuit assumed, without deciding, that Dr. Pile's testimony was constitutionally inadmissible, and that it tainted the jury's finding of future dangerousness, but ruled that the error did not invalidate Smith's death sentence because it did not taint the jury's finding that the offense was "outrageously or wantonly vile, horrible or inhuman . . ." In reaching this conclusion, the court interpreted *Zant* v. *Stephens*, 462 U.S. 862 (1983), to stand for

the general proposition that a death sentence is constitutionally valid so long as it is predicated on at least one valid aggravating circumstance.

SUMMARY OF ARGUMENT

An adequate mental evaluation by a qualified psychiatrist or psychologist is often "crucial to the defendant's ability to marshal a defense." *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed.2d 53, 64 (1985). That evaluation will only be reliable if it can be a full and probing inquiry into the circumstances of the offense and the defendant's previous behavioral history; if the defendant is not completely open and candid with the examiner, the evalution may be worthless. If the defendant is not free to discuss the offense, or his thoughts and feelings at the time of the offense, or any prior offenses, out of fear that the information could be used by the prosecution to convict or execute him, he would sacrifice his opportunity to explore and present available claims in exculpation or mitigation. On the other hand, a defendant who yields his innermost thoughts and feelings to the clinical inquiry, and then finds his disclosures used to prove the prosecution's case, has become the "deluded instrument" of his own conviction or execution.

Most state and federal courts have long recognized that it is fundamentally unfair to require a criminal defendant to choose between his right to clinical evaluation and assistance and his privilege against self-incrimination. The only issue on which courts have disagreed is the path to this conclusion. Some courts have rested the ban on a Sixth Amendment foundation, viewing the relationship between the examiner and the defendant as an extension of the attorney-client relationship, and the communications between the client and the examiner as protected by the attorney-client privilege. Other courts have ruled that affirmative prosecutorial use of the defendant's disclosures violates the Fifth Amendment. Finally, other courts have hesitated to tie the exclusionary rule to the Fifth Amendment because of the implication that "voluntary" statements would be admissible; instead these courts have rooted their reasoning directly in the Due Process Clause, holding that it is fundamen-

tally unfair to put the defendant to a choice between his Sixth Amendment interest in exploring and presenting clinically-based defenses and his Fifth Amendment interest in avoiding self-incrimination.

The choice of the underlying constitutional theory may have implications for the resolution of issues not before the Court in this case, but for purposes of resolving Smith's claim, all of these theories lead to the same result: the prosecution may not make affirmative use of the defendant's statements to a psychiatrist to prove the elements of its case on "guilt" or in aggravation of sentence.

Most of the decisions barring affirmative use of the defendant's disclosures to prove guilt predate the contemporary generation of capital sentencing statutes and do not mention capital sentencing proceedings. However, the principles upon which they are based are clearly applicable to the sentencing phase of a capital case. In these proceedings, the prosecution's proof of aggravating circumstances is the functional equivalent of its proof of the elements of the crime at the guilt stage (*Bullington* v. *Missouri*, 451 U.S. 430 (1981)); and capital defendants need expert assistance to explore and develop claims in mitigation (*Ake* v. *Oklahoma*, ____ U.S. ____, 84 L.Ed.2d 53 (1985)). This Court should hold that statements or other disclosures made by the defendant during a defense-requested mental evaluation, and opinions based on those statements or disclosures, are constitutionally inadmissible when offered affirmatively by the prosecution to prove the elements of the offense or to establish the statutory predicate for a death sentence. On the facts of this case, Dr. Pile's testimony was clearly inadmissible.

Dr. Pile's testimony was not harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18 (1967). To the contrary, there is a significant likelihood that the constitutionally inadmissible evidence contributed to the jury's finding of the "future dangerousness" aggravating circumstance and that the dangerousness factor played a determinative role in the jury's decision to impose the death penalty.

The Fourth Circuit apparently understood this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862 (1983), to stand for the sweeping proposition that a demonstrably prejudicial constitutional error in the capital sentencing process may be ignored as long as the error does not taint every aggravating circumstance. This interpretation rests on a fundamental misunderstanding of *Zant* v. *Stephens*. As the Court emphasized in *Zant* v. *Stephens*, "[a]lthough not every imperfection in the deliberative process is sufficent, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." 462 U.S. at 885. Smith has demonstrated a clear error of constitutional magnitude. This Court should set aside his death sentence.

ARGUMENT

I.

DR. PILE'S TESTIMONY ABOUT INCRIMINATING STATEMENTS MADE BY SMITH DURING A PRETRIAL MENTAL EVALUATION REQUESTED BY THE DEFENSE, WHEN INTRODUCED BY THE PROSECUTION FOR THE SOLE PURPOSE OF PROVING ITS CASE-IN-AGGRAVATION, WAS CONSTITUTIONALLY INADMISSIBLE.

In *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court addressed, for the first time, the constitutional principles governing mental evaluations in criminal cases. In *Smith*, what appeared on its face to be a "neutral" evaluation of the defendant's competency to stand trial was transformed into a process for enabling the prosecution to meet its burden of proving statutory aggravating circumstances at the capital sentencing trial.[1] Although Dr. Grigson was ordered to conduct a "neutral competency examination," the psychiatrist became an agent of the state when he "testified for the prosecution at the penalty phase on the crucial issue of [Smith's] future dangerousness."

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[1] Texas law explicitly prohibited affirmative prosecutorial use of disclosures made during the competency exam to prove the defendant's guilt. 451 U.S. at 463 n.6.

451 U.S. at 467. This practice obviously implicated the defendant's interest in not being the "deluded instrument of his own execution," 451 U.S. at 462, and unfairly distorted the balance of the adversary system. By holding that counsel must be notified, and the defendant warned, before any such evaluation is conducted, the Court substantially reduced the likelihood that a prosecutor will be able to use a pretrial mental evaluation as an investigative tool in a case in which the defense has not sought an evaluation.[2]

However, the Texas practice at issue in *Estelle* v. *Smith* was so unusual that the Court's decision has little direct bearing on the great majority of pretrial mental evaluations. See generally, White, "The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases," 74 *J. Crim. L. & Criminology* 943 (1983); Slobogin, "Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation," 31 *Emory L.J.* 31 (1982). Most such evaluations are either sought by the defense or are sought by the prosecution in response to notice given by the defense of its intention to plead insanity or otherwise put mental condition in issue. Resolution of Michael Smith's case requires the Court to clarify the principles to be applied in at least the first of these two contexts.

Dr. Pile was ordered by the Court to evaluate Smith at the request of defense counsel to help him explore claims in exculpation or mitigation based on Smith's mental condition. Over defense objection, the prosecution called Dr. Pile to testify at the sentencing phase about an incriminating statement made by Smith during the evaluation. The defense did not plan to call Dr. Pile to testify and the testimony elicited by the prosecution was not offered to rebut any claim raised by the defense in mitigation.

When Judge Carneal overruled the defense objection to Dr. Pile's testimony, he was presumably relying on *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*,

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[2] In most jurisdictions, as in Texas, information disclosed during a competency evaluation may be used only in resolving the competency issue, and specifically may not be used on the issue of guilt. See, e.g., 18 U.S.C. § 4244.

425 U.S. 994 (1976). Under *Gibson*, the prosecution was permitted to make affirmative use of incriminating statements made by the defendant during a court-ordered psychiatric examination to prove the elements of the crime.[3] The Virginia Supreme Court held: "[W]hether an accused consents or is required to submit to a psychiatric examination, if during the examination he is *not compelled* to answer questions concerning the offense with which he is charged, there is no violation of his right against self-incrimination." 216 Va. at 414 (emphasis in original). It followed from *Gibson*, of course, that Dr. Pile's testimony about Smith's incriminating admissions could be used at the sentencing phase of his trial.

The issue before this Court is whether *Gibson* v. *Commonwealth* states a constitutionally permissible rule. In *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1979), *cert. denied*, 439 U.S. 996 (1978), the Fourth Circuit ruled that it did not, holding that the prosecution may not make affirmative use of information disclosed during *any* pretrial mental evaluation to prove the defendant's "guilt."[4] In so holding, the Fourth Circuit subscribed to the prevailing constitutional understanding in the federal courts and in most state courts that have addressed the constitutional issue. Although the courts have employed dif-

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[3] Gibson had been charged with murdering his estranged wife and her father. After his arrest, and at the request of his counsel, he was committed to Central State Hospital for evaluation of his competency to stand trial and his sanity at the time of the offense. At his trial, the prosecution called the examining psychiatrist, Dr. Dimitris, to testify that Gibson had admitted the killings during the examination. (He testified that Gibson had told him he remembered going to his father-in-law's house and shooting him but that he did not remember anything thereafter.)

[4] *Gibson* v. *Zahradnick* was decided after Smith's case had been briefed but before it had been argued on direct appeal. The Fourth Circuit held that the admission of Dr. Dimitris' testimony about Gibson's incriminating statements violated the Fifth Amendment:

> An incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, whether the defendant or the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity [at the time of the offense].

581 F.2d at 80.

ferent constitutional theories, they agree on the fundamental proposition that the prosecution is not permitted to make affirmative use[5] of evidence derived from a pretrial mental evaluation sought by the defense.[6]

A. Unless Affirmative Prosecutorial Use Of Information Derived From A Defense-Requested Mental Evaluation Is Proscribed, The Defendant Is Forced To Choose Between His Privilege Against Self-Incrimination And His Constitutional Right To An Adequate Mental Evaluation.

In *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed. 2d 53, 64 (1985), this Court recognized that access to an adequate mental evaluation and expert assistance are often "crucial to the defendant's ability to marshal a defense" in cases where "the law makes the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer."

In capital cases, consideration of the defendant's mental or emotional condition at the time of the offense, as well as his personal history and character, is a constitutionally indispensable feature of the sentencing process. See, e.g., *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *cf. Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980); Most capital sentencing statutes specify, as mitigating circumstances, factors relating to the offender's diminished responsibility, see, e.g., *Va. Code Ann.*

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[5] The term "affirmative use" is being employed as a shorthand reference to the use of evidence to prove those elements of the prosecution's case which are logically independent of claims raised by the defense. It is not being used as a synonym for the prosecution's burden of proof because the prosecution may bear the burden of persuasion on claims which the defense is required to raise, such as the insanity defense. Similarly, the defendant may introduce evidence regarding his mental condition to disprove mens rea; in this situation, the prosecution's use of evidence derived from a mental evaluation would be used "responsively" even though the prosecution still bears the burden of proving mens rea.

[6] Constitutional rulings on the issue have rarely been required because affirmative prosecutorial use of information disclosed during a pretrial mental evaluation is proscribed by statute, court rule, or case law in the federal courts and in at least 38 states. See Argument I D, infra.

§ 19.2-264.4 (1983 Repl. Vol.), and the defendant's case in mitigation often rests on a foundation of clinical[7] testimony. As a result, access to a comprehensive clinical evaluation is virtually a necessity for a defendant charged with a capital crime.

In *Ake*, this Court held that upon a proper showing of need, the state must assure an indigent defendant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." 84 L.Ed. 2d at 66.[8] The underlying question in this case is whether the evaluation and assistance envisioned in *Ake* is possible if a state permits affirmative prosecutorial use of incriminating disclosures made by the defendant during the evaluation.

An adequate evaluation of a defendant's mental condition at the time of the offense ("reconstructive" evaluation) requires the clinician to conduct a probing interview focusing on the defendant's "thoughts, feelings and actions before, during and after the time of the crime." J. MacDonald, *Psychiatry and the Criminal* 47 (1958). See also S. Halleck, *Law in the Practice of Psychiatry: A Handbook for Clinicians* 220 (1980); T. Gutheil and P. Appelbaum, *Clinical Handbook of Psychiatry and the Law* 300 (1982). See also the testimony of Drs. Showalter and Dimitris in the state habeas proceeding in Smith's case. App. 99, 116-117. The utility of the clinical interview depends

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[7] "Clinical" is used as a shorthand reference to the broad category of evaluations and opinions relating to the defendant's mental condition or behavior within the specialized knowledge of psychiatrists, psychologists and other mental health and mental retardation professionals.

[8] Although this Court linked its holding in *Ake* to the Due Process Clause rather than to the Sixth Amendment, it is clear that expert evaluation and assistance is sometimes necessary to provide constitutionally adequate assistance of counsel. See, e.g., *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *Edney* v. *Smith*, 425 F.Supp. 1038 (E.D.N.Y. 1976). In fact, where expert knowledge is required to enable the attorney to evaluate the defendant's case and prepare a defense, the failure to request expert assistance may constitute ineffective assistance of counsel. See, e.g., *Wood* v. *Zahradnick*, 578 F.2d 980 (4th Cir. 1980); *United States* v. *Edwards*, 488 F.2d 1154 (5th Cir. 1974); *Loe* v. *United States*, 545 F.Supp. 667 (E.D. Va. 1982); *Brennan* v. *Blankenship*, 472 F.Supp. 149 (W.D. Va. 1979).

strongly on the subject's willingness to say what comes to mind, without screening or filtering his feelings and thoughts.[9]

The relation between full disclosure and informed clinical opinion was succinctly emphasized by the Fourth Circuit in *Gibson* v. *Zahradnick*, 581 F.2d 75, 79 (4th Cir. 1978):

> . . . The most dependable and reliable testimony by psychiatrists would be unobtainable in many cases unless they were free to inquire into the prior aberrant conduct of the defendant, including his participation in the criminal activity with which he is charged. A person's mental condition, his motivation and his delusions would be undiscoverable in most instances unless the psychiatrist knows what the defendant has done and can engage in a penetrating discussion with the person about it. . . .

Accord, *United States* v. *Leonard*, 609 F.2d 1163, 1165-66 (5th Cir. 1980); *Collins* v. *Auger*, 577 F.2d 1107, 1110 (8th Cir. 1978), *aff'g* 428 F. Supp. 1079, 1083 (S.D. Iowa 1977); *United States* v. *Cohen*, 530 F.2d 43, 47 (5th Cir. 1976); *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *United States* v. *Bohle*, 445 F.2d 54, 67 (7th Cir. 1971); *United States* v. *Albright*, 388 F.2d 719, 726 (4th Cir. 1968). Thus, any impediment to full and free disclosure poses a threat to the utility and reliability of the evaluation.

If the prosecution were permitted to make unrestricted use of disclosures made during a pretrial mental evaluation, a

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[9] It is generally agreed that a personal interview is necessary to provide an adequate clinical predicate for the kinds of judgments contemplated in criminal trials. See ABA Criminal Justice Mental Health Standards, Std. 7-3.11 and accompanying commentary. Although some courts continue to admit opinion testimony based only on hypothetical questions or courtroom observations, and such testimony is constitutionally permissible, *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), this practice is discouraged by the prevailing opinion in the mental health disciplines. See Diamond and Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations," 63 *Mich. L. Rev.* 1325, 1347 (1965); *United States* v. *Albright*, 388 F.2d 719, 725 (4th Cir. 1968) ("Medical Science . . . deems [courtroom observations and hypothetical questions] poor and unsatisfactory substitutes for testimony based upon prolonged and intimate interviews between the psychiatrist and the defendant.")

defendant would be put to a choice between his right under *Ake* to explore defenses based on mental condition and his Fifth Amendment privilege against self-incrimination. Indeed, the effect of the Virginia rule announced in *Gibson* v. *Commonwealth* is to condition the indigent defendant's access to a mental evaluation on a wholesale surrender of his Fifth Amendment privilege.[10] It is fundamentally unfair to require such a choice. See, e.g., *Gibson* v. *Zahradnick*, *supra* at 80 (4th Cir. 1978); *Collins* v. *Auger*, 577 F.2d at 1109-10 (8th Cir. 1978).

In reaching this conclusion, courts have relied on this Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968). *Simmons* is directly on point. In that case, a defendant filed a pretrial suppression motion. To establish his standing to invoke the protections of the Fourth Amendment, he testified at the suppression hearing that the suitcase in question belonged to him. The District Court denied the motion to suppress. At the ensuing trial, the defendant's testimony at the suppression hearing was admitted against him. This Court reversed the conviction. In an opinion delivered by Justice Harlan, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394.

Justice Harlan acknowledged that the defendant's testimony at the suppression hearing, "as an abstract matter," could be said to be "voluntary," and that "testimony is not always invol-

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[10] As discussed in Argument I D, *infra*, many states insulate disclosures to defense-retained experts from disclosure to, or use by, the prosecution by bringing them within the attorney-client privilege. If a state were to afford such protection to defendants financially able to retain experts, while failing to afford such protection to indigent defendants whose experts are appointed by the court, this differential treatment would deny the indigent defendant equal protection of the law. See *Collins* v. *Auger*, 428 F.Supp. 1080, 1084 (S.D. Iowa 1977). In Virginia, however, it is not clear whether disclosures to defense-retained experts are protected by the attorney-client privilege; the issue does not appear to have been litigated.

untary as a matter of law simply because it is given to obtain a benefit." He continued:

> However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which this "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case, [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Id. See also *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 807-08 (1977) (person cannot be required to choose between First Amendment right of association and Fifth Amendment privilege against self-incrimination).[11]

The tension between the defendant's Fifth Amendment right and his right to an adequate mental evaluation presents a compelling basis for applying the principle enunciated in *Simons* v. *United States*. It is true, of course, that the *Sim-*

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[11] It is possible, in theory, that the government may make mental evaluations available in a broader range of situations than the Constitution would be construed to require. For example, the state may make the evaluation available simply upon the attorney's request rather than requiring a showing that the defendant's mental condition is likely to be a "significant factor" in the case. See *Ake* v. *Oklahoma*, 84 L.Ed.2d at 66. However, even in these situations, the state cannot condition the availability of such an important benefit on the surrender of a constitutional privilege. *Cf. Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) ("To condition the availability of [unemployment] benefits upon [a person's] willingness to violate a cardinal principle of his religious faith effectively penalizes the free exercise of his constitutional liberties"); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (state cannot condition public employment, government contracts, or bar membership on waiver of privilege against self-incrimination with respect to alleged misconduct connected with the activities.) The point is primarily of theoretical interest in capital cases such as *Smith* because virtually every capital defendant will be able to demonstrate that his mental condition is relevant to possible claims in mitigation and therefore that he is entitled to a clinical evaluation and assistance under *Ake*.

mons argument is susceptible to formalistic application, focusing attention on the mere "*fact* of a choice rather than the *nature* of a choice" and thereby obscuring "the considerations that determine whether a given choice is constitutionally acceptable." Westen, "Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another," 66 *Iowa L. Rev.* 741, 745 (1981). However, the choice to which the defendant is put under the rule of *Gibson* v. *Commonwealth* is a demonstrably unfair choice because it eviscerates the defendant's legitimate Fifth Amendment interests in a way unjustified by the needs of the adversary process.

The unfairness of *Gibson* v. *Commonwealth* is highlighted by comparing the choice required of a defendant who seeks a mental evaluation with the choice required of a defendant who is required to submit to a prosecution-requested mental examination after giving notice of his intent to place his mental condition in issue. It has been argued that a defendant required to submit to a compulsory mental examination is forced to surrender his Fifth Amendment privilege as the price for exercising his right to raise the insanity defense or other defensive claims based on mental condition. Most courts have rejected this argument, holding that the defendant may fairly be required to surrender his Fifth Amendment interests if he chooses to put his mental condition in issue. See *Estelle* v. *Smith*, 451 U.S. at 465-66.

Almost without exception, however, courts that have upheld the constitutionality of compulsory examinations have also limited the adverse impact on the defendant's Fifth Amendment interests by holding that the prosecution may not make affirmative use of the defendant's disclosures to prove the elements of its case on "guilt"; as usually formulated, the rule permits the prosecution to use evidence derived from the evaluation only to rebut claims raised by the defendant concerning his mental condition.[12] Such a rule is necessary to maintain a "fair state-

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[12] See, e.g., *Phelan* v. *State*, 273 Ind. 542, 406 N.E.2d 237 (1980); *Noyes* v. *State*, 516 P.2d 1368 (Okla. 1973); *State* v. *Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965). See generally Model Penal Code and Commentaries, § 4.09, pages 265-70 (1985).

Before the adoption of Rule 12.2(c) of the Federal Rules of Criminal

individual balance" in the administration of the penal law, the policy underlying the Fifth Amendment. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964).

The effort to achieve a fair balance in the adversary process may justify rules requiring the defendant to cooperate with the state's examiners as a condition of introducing expert testimony of his own, and permitting the prosecution to use evidence derived from the evaluation to counter claims raised by the defendant; but the need to satisfy the prosecution's legitimate interests does not justify a total obliteration of the defendant's Fifth Amendment interests, and in particular, does not justify affirmative prosecutorial use of evidence derived from the examination. It should also be emphasized that a ban on affirmative use of evidence derived from the evaluation does not compromise any legitimate interests of the prosecution; it deprives the state of no evidence that it would have had if the defendant had not sought the evaluation in the first place.

The only alternative remedy that has been suggested is to require the examiner to warn the defendant that his disclosures can be used against him. Such warnings could decrease the likelihood that the defendant would surrender his privilege unwittingly,[13] but the defendant and his counsel are

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Procedure, which codifies this proscription, almost every federal circuit had reached this conclusion on constitutional grounds. See, e.g., *United States* v. *Albright*, 388 F.2d 719, 725-26 (4th Cir. 1968); *United States* v. *Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States* v. *Bennett*, 460 F.2d 872 (D.C. Cir. 1972); *United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *United States* v. *Reifsteck*, 535 F.2d 1030, 1034 (8th Cir. 1976). *Cf. Pope* v. *United States*, 372 F.2d 710, 720 (8th Cir. 1967); *United States* v. *Baird*, 414 F.2d 700, 706-710 (2d Cir. 1969).

[13] There is reason to doubt that "psychiatric *Miranda* warnings" are sufficient to assure rational decisions by the defendants themselves. The climate of a clinical interview tends to promote disclosure, even in the face of warnings. See, e.g., Read, "Can a Psychiatric Miranda Work? A California Perspective," 14 *Rutgers L.J.* 431 (1983). Indeed, only well-informed counsel would be in a position to make a carefully considered choice concerning the advisability of disclosures; the decision would require the exercise of counsel's judgment regarding the strength of the prosecution's case and the prospect that a clinically-based defensive claim could be successfully raised. The

still left with the necessity of choosing between constitutional rights. See, e.g., *Collins* v. *Auger*, 577 F.2d 1107, 1109-10 (8th Cir. 1978) ("If the giving of a *Miranda* warning satisfied the requirements of the Fifth Amendment and the Fourteenth Amendment and made the defendant's incriminating admissions admissible, the defendant would be placed in a situation where he must sacrifice one constitutional right to claim another") (quoting *Collins* v. *Auger*, 428 F. Supp. 1079, 1083 (S.D. Iowa 1977)); *Gibson* v. *Zahradnick*, 581 F.2d 75, 79 n.1 (4th Cir. 1978). If this Court were to hold that the Constitution is satisfied if the defendant is warned that his statements can be used against him, the tension between the right to develop evidence in mitigation and the right to remain silent would remain unresolved.[14]

The constitutional logic leading to the conclusion that the prosecution may not make affirmative use of disclosures made by the defendant during a pretrial mental evaluation seems irrefutable, and all federal courts that have confronted the issue have reached this conclusion. The only question upon which they have disagreed is the constitutional provision upon which to predicate the holding.

The Fourth Circuit rested its holding in *Gibson* on the Fifth Amendment. *Accord*, *United States* v. *Leonard*, 609 F.2d 1163

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problem for counsel is that the decision to seek a mental evaluation ordinarily must be made before sufficient information is available to make an informed judgment about the prosecution's case; moreover, the assistance of an expert is necessary, in most cases, to enable counsel to make an informed decision about the potential utility of the clinical claims.

[14] As was noted at the outset of the Argument, the Fifth Amendment analysis of *Estelle* v. *Smith*, 451 U.S. 454 (1981), is not directly applicable to cases in which the defense seeks a mental evaluation. Although a warning may be sufficient to protect the defendant's Fifth Amendment interests in the context presented in *Estelle* v. *Smith*, it would not be a satisfactory solution in cases in which the defendant seeks the evaluation to explore possible avenues of defense.

Even if the Court were to hold that a defendant who requests a pretrial mental evaluation waives his privilege against self-incrimination by speaking to the examiner, *Estelle* v. *Smith* holds that such a waiver can be effected only if the examiner gives the proper warning. Because Dr. Pile did not warn Smith that his statements could be used against him, Dr. Pile's testimony was constitutionally inadmissible even on this narrow ground.

(5th Cir. 1980); *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965). Other courts have reached the same conclusion, relying upon the same rationale, but have traveled down slightly different paths of constitutional logic. In *Collins Auger*, 577 F.2d 1107, 1109 (8th Cir. 1978), the Eighth Circuit held that it is "fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt." In reaching this conclusion the court adopted the reasoning of Judge Stuart's thoughtful opinion in *Collins* v. *Auger*, 428 F.Supp. 1079 (S.D. Iowa 1977). See also *State* v. *Craney*, 347 N.W.2d 376 (Iowa 1975). Finally, in *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975), the Third Circuit took a broader view of the issue, holding that disclosures made during a defense-requested mental evaluation are constitutionally privileged under the Sixth Amendment. Under this approach, the relationship between the expert and the defendant is viewed as an extension of the attorney-client relationship, and prosecutorial use of evidence derived from the evaluation is viewed as a violation of the attorney-client privilege, which is itself viewed as having its roots in the Sixth Amendment. See also *Edney* v. *Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976).

The choice of the underlying constitutional theory may have implications for the resolution of issues not before the Court in this case, such as whether the prosecution may call an expert who conducted an examination at the request of the defense (i) to express an opinion different from the opinion expressed by another expert witness called by the defense or (ii) to impeach the defendant's own testimony.[15] However, for purposes of

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[15] On the question whether the prosecution may call the expert to testify, in rebuttal, on mental condition, *compare United States* v. *Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975); *State* v. *Pratt*, 284 Md. 516, 398 A.2d 421 (1979); and *Houston* v. *State*, 602 P.2d 784 (Alaska, 1979) *with Edney* v. *Smith*, 425 F.Supp. 1038 (E.D. N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977). The issue is discussed at length in the opinions in *Noggle* v. *Marshall*, 706 F.2d 1408 (6th Cir. 1983). See generally, Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists," 66 *Va. L. Rev.* 597 (1980).

On the question of use of the expert testimony for purposes of impeachment, *compare United States* v. *Leonard*, 609 F.2d 1163 (5th Cir. 1980), *with United States* v. *Castenada*, 535 F.2d 605 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977).

resolving Smith's case, all of these theories lead to the same result: the prosecution may not make affirmative use of the defendant's disclosures, or opinions based on those disclosures, to prove the elements of its case.

B. The Settled Principle That The Prosecution May Not Make Affirmative Use Of Evidence Derived From A Pretrial Mental Evaluation To Prove The Defendant's "Guilt" Also Applies To Proof Of Aggravating Circumstances At The Sentencing Phase Of A Capital Case.

Gibson v. *Zahradnick*, *United States* v. *Alvarez* and *Collins* v. *Auger* and most of the other cases cited above predate the contemporary generation of capital sentencing statutes and do not mention capital sentencing proceedings. However, the principles upon which they are based are clearly applicable to the sentencing phase of a capital case. First, this Court held in *Estelle* v. *Smith*, 451 U.S. 454 (1981), that the Fifth Amendment is applicable in capital sentencing proceedings: "We can discern no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63. Second, in a capital sentencing proceeding, the prosecution's proof of its case-in-aggravation is the functional equivalent of its proof of the elements of a criminal offense at the guilt stage. *Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Estelle* v. *Smith*, 451 U.S. at 466. Finally, a capital defendant requires access to a psychiatric evaluation and assessment because his case in mitigation will typically rest on a foundation of psychiatric testimony.

In Virginia, in order to establish the evidentiary predicate for the death penalty, the Commonwealth has the burden of proving either of the two aggravating circumstances (future dangerousness or "vileness") beyond a reasonable doubt. Accordingly, it follows from the constitutional principle recognized in *Gibson*, *Alvarez*, and *Collins* that the prosecution may not use against a defendant, as part of its case-in-aggravation in a capital sentencing proceeding, any incriminating statements made by the defendant during the course of a psychiatric evaluation; psychiatric evidence obtained during such an eval-

uation is admissible only if the defendant puts his mental condition in issue to prove mitigating circumstances, and then only on the issues raised, not on any unrelated issues in aggravation.[16] *Accord Battie* v. *Estelle*, 655 F.2d 692, 700 (5th Cir. 1981) (holding that a psychologist's testimony diagnosing defendant as a sociopath likely to follow a violent career was constitutionally inadmissible "where the defense neither requested an examination on future dangerousness nor introduced psychiatric or psychological testimony on that issue").[17] Applying these generally accepted principles, Dr. Pile's testimony was clearly inadmissible.

C. The Permissibility Of Affirmative Prosecutorial Use Of A Defendant's Disclosures During A Pretrial Mental Evaluation Should Not Depend, As The Commonwealth Contends, On Who Requested The Evaluation.

In its briefing and argument before the Fourth Circuit, the Commonwealth conceded that the Fifth Amendment pre-

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[16] In some cases, the issues may be so intertwined that testimony concerning a mitigating circumstance may also tend to prove an aggravating circumstance, or may open the door to such testimony, but the settled constitutional understanding is that the decision to open the door to psychiatric testimony, in light of its evidentiary risks, should be controlled by the defense. Be that as it may, no such double-edged sword problem was presented in Smith's case. Dr. Pile's testimony was used affirmatively by the prosecution and was not relevant to any claim in mitigation raised by the defense.

[17] In *Battie*, the Fifth Circuit also pointed out that the examiner, who conducted the evaluation upon defense request, "did not advise Battie of his fifth amendment privilege." Neither did Dr. Pile in Smith's case. However, for the reasons discussed above, this is not the critical variable. Whether or not the defendant is warned, his Fifth Amendment right cannot be "waived" by talking to the psychiatrist, but only by putting his mental condition in issue at trial.

The Commonwealth had also claimed in *Gibson* that the defendant's disclosures had been voluntary. Judge Haynesworth noted in response that Gibson had not been adequately warned in any event but went on to emphasize that such a warning would not have vitiated the constitutional defect in the process: "We do not mean to imply that if a defendant were given a full *Miranda* warning, an incriminating statement made by the defendant during the ensuing psychiatric examination could be used at trial to prove the defendant's guilt." *Id.* at 79, n.1.

cludes the prosecution from introducing, as part of its case-in-chief (to prove a defendant's guilt or to prove aggravating circumstances in a capital case) statements elicited from the defendant during a psychiatric evaluation conducted *for the state*. However, the Commonwealth argued that the prosecution is *not* constitutionally precluded from introducing the same incriminating evidence if the evaluation was conducted *at the request of the defense*, even if the defendant has not put his mental condition in issue. Apparently, the Commonwealth's theory is either that a defendant waives his Fifth Amendment rights by requesting a psychiatric evaluation and talking to the examiner, or that the Fifth Amendment is not implicated at all when an evaluation is conducted for the defense. The Commonwealth reasoned that a defendant who makes incriminating disclosures to an examining psychiatrist has simply "confided to a friend" and "must suffer the consequences if the friend later betrays the confidence" (quoting *Conquest* v. *Mitchell*, 618 F.2d 1053, 1056-57 (4th Cir. 1980) (Haynesworth, C.J., concurring).

This reasoning is fatally flawed. First, a mental health professional conducting a pretrial forensic examination for the defense in a criminal case is not merely a friend in whom the defendant has chosen to confide. Instead, the examiner is serving an essential constitutional function in assisting the defendant to explore the availability of clinical evidence in exculpation or mitigation. *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed. 2d 53 (1985). Second, Smith's privilege against self-incrimination was clearly at stake in the evaluation by Dr. Pile. The court order directed Dr. Pile to send a copy of the report to the prosecution, and *Gibson* v. *Commonwealth* permitted the prosecution to make affirmative use of evidence derived from the evaluation. Under these circumstances, as in *Estelle* v. *Smith*, "[W]hen Dr. [Pile] went beyond simply reporting to the court on the issue of [Smith's mental condition at the time of the offense] and testified for the prosecution at the penalty phase on the crucial issue of [Smith's] future dangerousness, his role changed and became essentially like that of an agent of the State. . . ." 451 U.S. at 467.

Estelle v. *Smith* stands for the proposition that the Fifth Amendment is implicated in any pretrial mental evaluation, regardless of who requested it, if evidence derived from the evaluation can be used affirmatively by the prosecution. The rule of *Gibson* v. *Commonwealth* is no less offensive to the Fifth Amendment and to elemental notions of fairness in Smith's case than it would have been if he had been evaluated at the request of the prosecution. This is what the Fourth Circuit had so explicitly recognized in *Gibson* v. *Zahradnick*, *supra*, at 80:

> [A]n incriminating statement made during a psychiatric examination cannot be used to prove a defendant's guilt, *whether the defendant or the prosecutor requested the examination*, and whether it was had for the purpose of determining competency to stand trial or sanity [at the time of the offense]. [Emphasis added]

Battie v. *Estelle*, 655 F.2d 692 (5th Cir. 1981), is virtually identical to Smith's case in this respect. Upon defense motion, the trial court appointed a psychiatrist and psychologist to determine whether Battie was competent to stand trial and whether he was insane at the time of the crime. The psychologist submitted his report to the psychiatrist, who in turn submitted it, together with his own report, to the trial judge. The reports were then sent to the prosecution and defense. The psychiatrist was not called to testify by either party; however, the psychologist was called by the prosecution at the sentencing phase of Battie's trial to testify that Battie was a sociopath who would continue to pose a danger to society. The Fifth Circuit held that the testimony was constitutionally inadmissible. First, the Court noted, Battie was in the state's custody and the psychologist "had been appointed by the state trial court to conduct the examination and therefore the custodial interrogation was conducted by an agent of the state." *Id.* at 699-700. Second, the Court concluded that Battie had not waived his Fifth Amendment privilege "by requesting a psychiatric examination to determine his competency to stand trial and his sanity at the time of the commission of the crime." *Id.* at 700-701. The court then rejected the state's contention that "a

defendant's mere submission to a psychiatric or psychological examination constituted a waiver of the fifth amendment privilege." *Id.* at 702.[18]

Gibson and *Battie* recognize that defense-requested mental evaluations have Fifth Amendment implications. However, it is important to emphasize that neither of the evaluations conducted in these cases was structured within the framework of the attorney-client relationship. As in Michael Smith's case, the examiners' reports were sent to the prosecution as well as the defense, and the experts were not serving as agents of the defense within the protective umbrella of the attorney-client privilege.

This practice is likely to be abandoned in light of this Court's decision in *Ake* v. *Oklahoma*. It seems clear that the evaluation to which an indigent defendant is constitutionally entitled under *Ake* must be conducted within the framework of the attorney-client relationship and that any disclosures made by defendant to the expert should be insulated from disclosure to, or use by, the prosecution to the same extent as would be the case if the expert had been retained by a defendant financially able to defend himself without state assistance.

If mental evaluations for indigent defendants are structured to bring them within the framework of the attorney-client relationship, affirmative prosecutorial use of disclosures made by a defendant during such an evaluation is unlikely to be

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[18] The Fifth Circuit concluded that *Battie* was indistinguishable from *Estelle* v. *Smith*, notwithstanding the fact that Battie had requested the evaluation. Accordingly, because Battie had not been warned that his disclosures would be used against him, the Court set aside the sentence under *Estelle* v. *Smith*. However, the outcome in *Battie* does not properly turn on whether or not warnings were given. Battie was constitutionally entitled to a psychiatric evaluation; he did not waive his Fifth Amendment rights by requesting or participating in the evaluation; and the prosecution's use of the disclosures would have been constitutionally permissible only if they had been relevant to an issue raised by the defense. Because Battie did not introduce psychiatric or psychological testimony to disprove dangerousness, prosecutorial use of the psychologist's testimony was constitutionally impermissible.

permitted in most states due to the protections afforded by various evidentiary privileges. (See Argument I D.) If a state were to permit such evidence to be used by the prosecution, however, this Court should not hesitate to hold, for the reasons discussed in this brief, that the evidence is constitutionally inadmissible.

In its brief in the Fourth Circuit, the Commonwealth relied on *Smith* v. *Wainwright*, 741 F.2d 1248 (11th Cir. 1984). In *Smith* v. *Wainwright*, the prosecution called a psychiatrist originally retained by the defense to testify that the defendant had claimed amnesia concerning the crime. The testimony was introduced to contradict Smith's alibi that he did not commit the murder but was at home "sleeping off a drunk." The Eleventh Circuit ruled that the protections of *Estelle* v. *Smith*, 451 U.S. 454 (1981), "do not apply unless the psychiatrist is 'essentially an agent of the state . . .'" *Id.* at 1259. While the Eleventh Circuit was correct in ruling that *Miranda* warnings are not required in this context, it failed to recognize that the defendant's Fifth and Sixth Amendment interests were nonetheless implicated by the psychiatric evaluation.[19]

In *Smith* v. *Wainwright*, the defendant had apparently obtained the psychiatric expert with his own funds. For this reason, the court found it difficult to regard the psychiatrist as an "agent of the state" or to see how the Fifth Amendment was implicated. What the Eleventh Circuit overlooked was that under this Court's reasoning in *Estelle* v. *Smith*, the psychiatrist becomes an "agent of the state" as soon as he takes the witness stand to testify in aggravation; it is the prosecution's affirmative use of incriminating evidence derived from the evaluation which implicates the Fifth Amendment, and this is so regardless of who requested the evaluation.

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[19] The result in *Smith* v. *Wainwright* may be correct, but not for the reasons given by the Court. Even if the prosecution is precluded by the Fifth, Sixth and Fourteenth Amendments from making affirmative use of evidence derived from the defense-requested mental examination, it might nonetheless be permissible to use such evidence to impeach the defendant's testimony if he chooses to testify. See note 15, *supra*.

Alternatively, the prosecution's affirmative use of incriminating evidence derived from an evaluation initially structured within the framework of the attorney-client relationship, as it was in *Smith* v. *Wainwright*, can be characterized as a violation of the Sixth Amendment and the Due Process Clause. See *United States* v. *Alvarez*, 519 F.2d 1036 (3d Cir. 1975). Whatever the characterization, however, the underlying principle is the same—the defendant needs access to a psychiatric evaluation to defend himself, and his right to defend himself is severely compromised, if not completely undermined, if he must surrender his privilege against self-incrimination as the price for exploring possible defenses in exculpation or mitigation.

D. Affirmative Prosecutorial Use Of Evidence Derived From A Defense-Requested Mental Evaluation Is Already Prohibited In A Substantial Majority Of States And In The Federal Courts.

The rule announced by the Virginia Supreme Court in *Gibson* v. *Commonwealth* and applied in Michael Smith's case has been rejected in a substantial majority of states and in the federal courts. The aberrant nature of Virginia's approach is relevant to this Court's constitutional inquiry for two reasons. First, the Court need not be concerned about the repercussions of a ruling precluding, as a matter of constitutional law, affirmative prosecutorial use of evidence derived from a pretrial mental evaluation requested by the defense. Such a ruling would have little impact outside Virginia, and even in Virginia its impact would be limited.[20] Second, Smith's contention that

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[20] See *Va. Code Ann.* §§ 19.2-169.5E and 19.2-169.7, enacted in 1982. Section 19.2-169.7 provides, in pertinent part, that "no statement or disclosure by the defendant concerning the alleged offense made during [a pretrial mental evaluation or treatment] may be used against the defendant at trial as evidence or as a basis for such evidence, except on the issue of his mental condition at the time of the offense after he raises the issue. . . ." The applicability of this section to capital sentencing is not altogether clear. However, counsel are aware of two cases which might be affected by the decision in Smith's case. See *Giarratano* v. *Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980); *Tuggle* v. *Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), vacated and remanded in light of *Ake* v. *Oklahoma*, *Tuggle* v. *Virginia*, 471 U.S.____, 85 L.Ed. 2d 835 (1985), *affirmed on remand* 229 Va. ____, 334 S.E.2d 838 (1985).

the rule announced in *Gibson* v. *Commonwealth* contravenes fundamental concepts of fairness is reinforced by its widespread rejection in other states.

1. In at least 19 states, statutes, court rules or judicial decisions specifically bar affirmative prosecutorial use of information disclosed during any court-ordered pretrial mental evaluation, whether requested by the defense or the prosecution.[21] Although the precise language of these provisions varies, most preclude use of the disclosures against the defendant except on the issue of mental condition. See also American Law Institute, Model Penal Code § 4.09[22] and American Bar Association Criminal Justice Mental Health Standards § 7-3.2 (1984).[23]

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[21] Citations appear in Appendix A.

[22] M.P.C. § 4.09 provides:

Section 4.09. Statements for Purposes of Examination or Treatment Inadmissible Except on Issue of Mental Condition.

A statement made by a person subjected to psychiatric examination or treatment pursuant to Sections 4.05, 4.06 or 4.08 for the purpose of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication [, unless such statement constitutes an admission of guilt of the crime charged].

[23] ABA Standard § 7-3.2 provides, in pertinent part:

Standard 7-3.2. Uses of Disclosures or Opinions Derived from Pretrial Mental Evaluations

(a) Admissibility of disclosures or opinions in criminal proceedings. No statement made by or information obtained from a person, or evidence derived from such statement or information, during the course of any pretrial mental health or mental retardation professional interview or mental evaluation, or during treatment or habilitation, and no opinion of a mental health or mental retardation professional based on such statement, information, or evidence is admissible in any criminal proceeding in which that person is a defendant unless the disclosure or opinion is otherwise admissible under Standard 7-3.9 and:

(i) relates solely to defendant's present mental competency and the use of such disclosure conforms to the requirements of Standard 7-4.6; or,

(ii) is otherwise relevant to an issue raised by defendant concerning defendant's mental condition and defendant intends to introduce the testimony of a mental health or mental retardation professional to support the defense claim on this issue.

In 12 additional states,[24] and in the federal courts, the applicable statute or court rule bars affirmative prosecutorial use of disclosures made during *prosecution-initiated* evaluations, but is silent on the limitations attaching to *defense-initiated* exams; however, in seven of these states and in the federal courts, it appears that disclosures made during defense-initiated evaluations are protected by testimonial privileges.

3. At least 25 states have effectively precluded affirmative prosecutorial use of evidence derived from defense-initiated examinations by providing that such examinations are encompassed by the attorney-client privilege (10 states) or the physician-patient or psychologist-patient privileges (16 states).[25] In some instances, however, the applicable statute or decision is unclear regarding coverage of communications between the defendant and court-appointed experts, although communications between the defendant and privately-retained experts are clearly covered.

4. Six states have overlapping protections derived from pretrial mental evaluation provisions and testimonial privileges. Thus, the net result is that at least 38 states preclude affirmative prosecutorial use of disclosures made by the defendant during defense-requested mental evaluations.

5. In 33 states, these statutes, rules and decisions appear to be clearly applicable to capital sentencing proceedings: the attorney-client or and physician/psychologist-patient privileges (25 states) appear to have general application, and the pretrial evaluation statutes (11 states) permit testimony only on "mental condition" in "any criminal proceeding." In the remaining states, however, the applicable language either expressly applies only to the guilt phase of a criminal trial, or precludes use of the testimony to prove "guilt," rather than limiting it, generally, to proof of "mental condition;" in these

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[24] Citations appear in Appendix B.

[25] California provides protection under both privileges. The citations appear in Appendix C and Appendix D, respectively.

states, the language does not apply, by its own terms, to sentencing proceedings.

6. In summary, at least 38 states already preclude affirmative prosecutorial use of disclosures made by the defendant during a pretrial mental evaluation to prove his guilt, and in 32 of the states, the evidentiary limitation is phrased broadly enough to preclude use of the defendant's disclosures to prove aggravating circumstances at the sentencing phase of a capital case. In most states, the prosecution is permitted to introduce expert testimony only if it is relevant to disprove a claim raised by the defendant concerning his mental condition. These rules are rooted in a long-settled understanding of the constitutional principles implicated by mental evaluations in criminal cases.

II.

THE RECORD DEMONSTRATES THAT THE CONSTITUTIONALLY INADMISSIBLE TESTIMONY BY DR. PILE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court ruled that a constitutional violation may be deemed harmless only when the court is persuaded that it was harmless beyond a reasonable doubt. 386 U.S. at 24. The proper inquiry, according to *Chapman*, is "whether there is a reasonable possibility that the tainted evidence . . . might have contributed to the conviction." 386 U.S. at 23. In the context of a death sentence, the question is whether there is a reasonable possibility that the tainted evidence might have contributed to the jury's decision to impose a death sentence or, conversely, whether the error is "so unimportant and insignificant that [it] may be deemed harmless." 386 U.S. at 22.

There is some indication in this Court's decisions that tainted evidence which "might have contributed to a conviction" may be deemed harmless if the other evidence of guilt is so overwhelming that there is "no reasonable doubt that the jury would have reached the same verdict without hearing the tainted testimony." *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972). Because the jury's sentencing decision in a capital case

is considerably less structured than its determination of guilt, the capacity of an appellate court to assess what the jury would have done in the absence of the tainted evidence is correspondingly restricted. There is no objective normative marker available to say what portions of the evidence were regarded as "overwhelming." For this reason, the harmlessness of constitutional error at the capital sentencing proceeding should be determined solely by asking whether the evidence might have contributed to the jury's decision. No less demanding standard would take adequate account of the qualitative difference between death and other forms of punishment and the "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

It cannot be said, beyond a reasonable doubt, that Dr. Pile's testimony did not contribute to the jury's decision to recommend a death sentence: it clearly contributed to the jury's finding of the "dangerousness" circumstance; and the dangerousness issue clearly played a pivotal role in the jury's decision to recommend the death penalty.

A. The "Dangerousness" Finding

The prosecution relied on Dr. Pile's description of the school bus incident in its closing argument, App. 31, to support its claim that Smith would be a continuing threat to society and that a death sentence was necessary to incapacitate him. In addition to the capital offense, Smith had been convicted of a previous rape. The self-admitted incident on the school bus added a third behavioral predicate for the prediction, one which may have had a more potent impact on the jury than the seriousness of the incident would otherwise warrant because it tended to show the chronicity of Smith's condition. Moreover, if Dr. Pile had not been permitted to testify, defense counsel would not have blundered into what he conceded was an inexplicable cross-examination, during which he elicited Dr. Pile's diagnosis (sociopathic personality) and his damaging assertions regarding the characteristics of such people and their

poor prospects for behavioral change. App. 7-9.[26] Thus Dr. Pile's testimony in general—and the school bus incident in particular—clearly contributed to the jury's finding on the dangerousness issue.

Dr. Pile's testimony was not merely "cumulative" as the Commonwealth suggested in its brief in the Fourth Circuit. The involuntary confession determined to be harmless beyond a reasonable doubt in *Milton* v. *Wainwright*, 407 U.S. 371 (1972), was indeed cumulative—the prosecution had also introduced two written confessions by the defendant together with statements that he had made when he reconstructed the crime for the police at the scene of its occurrence. This evidence was practically redundant on the same factual issue. In contrast, Dr. Pile's testimony was introduced to provide an *additional factual predicate* for the prediction of future dangerousness which the jury was urged to make and from which it was urged to infer a need to incapacitate Smith by executing him.

The inherently speculative nature of the dangerousness inquiry is reason enough for the Court to decline to undertake the task of assessing whether the other evidence offered by the prosecution was "so overwhelming" that the jury would have found the "future dangerousness" circumstances even in the absence of Dr. Pile's testimony. Both the Texas Court of Criminal Appeals and the Fifth Circuit have declined to do so when considering the effect of psychiatric testimony admitted in violation of this Court's ruling in *Estelle* v. *Smith*.See, e.g., *Clark* v. *State*, 627 S.W.2d 693, 697-98 (Tex. Cr. App. 1981); *White* v. *Estelle*, 720 F.2d 415, 418 (5th Cir. 1983); *Green* v.

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[26] Smith has unsuccessfully sought to demonstrate that counsel's obviously incompetent cross-examination denied him constitutionally adequate assistance of counsel. Whether or not counsel's defective performance fell below Sixth Amendment standards, it was demonstrably prejudicial. This Court should not close its eyes to counsel's error in assessing the harmful consequences of the constitutional violation committed when the court permitted the prosecution to call Dr. Pile as its witness. *Cf. Fahy* v. *Connecticut*, 375 U.S. 85, 87 (1963) (harmless error analysis must take into account the "effect of [constitutionally inadmissible] evidence upon the other evidence adduced at trial and upon the conduct of the defense").

Estelle, 706 F.2d 148, *rehearing denied with opinion*, 712 F.2d 995 (5th Cir. 1983); *Battie* v. *Estelle*, 655 F.2d 692 (5th Cir. 1981) (state called eleven witnesses to testify concerning defendant's bad reputation and two more who recounted specific acts of violence made by him; yet introduction of psychologists' testimony in violation of *Estelle* v. *Smith* not harmless).

B. The Death Sentence

The jury's questions, both during trial and during its deliberations, demonstrate that the dangerousness issue played a determinative role in its decision to recommend the death penalty. Two jurors interrupted Dr. Dimitris' testimony to ask about the different prognostic implications of Dr. Pile's diagnosis and his own. (App. 17-18.) In addition, the jury suspended its deliberations to ask the trial judge to explain the incapacitative consequences of a life sentence. (Transcript 1096.) Finally, the jury specifically declined to find that Smith's conduct in committing the offense manifested "depravity of mind" by striking this language on the verdict form (App. 39).[27] This determination is especially important because it shows that the jury was persuaded by Smith's claim that his criminal behavior was attributable to psychological aberration rather than an evil character, and that the death sentence was based on the jury's judgment that the aggravating circumstances, especially dangerousness, outweighed the mitigating circumstances, rather than on a judgment that mitigating circumstances did not exist.

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found the Petitioner to be "dangerous." However, in light of the prosecution's closing argument and the juror's questions, the record demonstrates a substantial likelihood that its finding of dangerousness tipped the balance leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the

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[27] The so-called "vileness" circumstance provides: "that [the defendant's] conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."

sentence of death was based, to a determinative degree, on its finding of dangerousness, a finding clearly influenced by Dr. Pile's inadmissible testimony.[28]

III

NOTHING IN THIS COURT'S DECISION IN *ZANT* V. *STEPHENS* SUGGESTS THAT A PREJUDICIAL CONSTITUTIONAL DEFECT IN THE SENTENCING PROCESS SHOULD BE IGNORED SIMPLY BECAUSE THE STATE PROVED AN UNTAINTED STATUTORY PREDICATE FOR A DEATH SENTENCE.

The Fourth Circuit assumed, without deciding, that Dr. Pile's testimony was constitutionally inadmissible and that it tainted the jury's finding of future dangerousness. However, the court nonetheless refused to set aside Smith's death sentence, apparently concluding that a demonstrably prejudicial error in the capital sentencing process may be ignored as long as the error does not taint every aggravating circumstance. For this sweeping and unprecedented proposition, the Fourth Circuit relied upon this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862 (1983). However, this construction of *Zant* v. *Stephens* is fundamentally misconceived.

A. The Fourth Circuit's Handling Of The Issue.

In its opinion below, the Fourth Circuit correctly noted that the

> jury's verdict recommending a death sentence was supported by two separate and distinct grounds of aggravation: (a) dangerousness (*i.e.*, violence) and (b) vileness. The asserted errors of constitutional dimension relating to the admission of psychiatric testimony were in testimony directed to the question of "dangerousness." The evidence presented to the jury supporting a showing of "vileness" was unchallenged.

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[28] It is noteworthy that the Fourth Circuit characterized Dr. Pile's testimony as "severely damaging" to Smith, 769 F.2d at 172 and that neither Judge Carneal nor the federal magistrate made any finding to the contrary.

Smith v. *Procunier*, 769 F.2d 170, 173 (4th Cir. 1985). However, the Court's reasoning took a breathtaking leap when it concluded that, as far as the Constitution is concerned "any one aggravating circumstance deemed sufficient by the jury suffices," *id.*, relying upon *Linwood Briley* v. *Bass*, 742 F.2d 155, 165 (4th Cir. 1984),[29] and *Zant* v. *Stephens*, 462 U.S. 862, 884 (1983).

It is certainly true that a finding of an aggravating circumstance "suffices" to establish a constitutionally adequate predicate for a death sentence if the aggravating circumstance "genuinely narrow[s] the class of persons eligible for the death penalty" and "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U.S. at 877. But the finding of an aggravating circumstance does not foreclose constitutional scrutiny of other aspects of a sentencing hearing.

For example, the finding of an aggravating circumstance does not "suffice" to establish the constitutionality of a death sentence when the defendant was precluded from introducing evidence concerning his character or record as a basis for mitigation; *Lockett* v. *Ohio*, 438 U.S. 586 (1978), established that the defendant has a constitutional right to an individualized determination of the propriety of a death sentence. Nor does the finding of an aggravating circumstance "suffice" to establish the constitutionality of a death sentence when the sentencer considered unreliable evidence which the defendant had no opportunity to confront and cross-examine; *Gardner* v. *Florida*, 430 U.S. 349 (1977), established that the defendant has a right to a fair and reliable determination of the disputed issues in a capital sentencing proceeding.

Thus, it is clear that a finding of a valid aggravating circumstance does not "suffice" to override any and all constitutional

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[29] The Fourth Circuit's citation to its own decision in *Linwood Briley* v. *Bass* was not pertinent since Briley objected only to the phraseology of the "vileness" instruction and did not claim either that the evidence was legally insufficient to establish the circumstance *or*, more importantly, that otherwise inadmissible evidence had been offered to prove it.

defects in a capital sentencing hearing. In Smith's case, evidence introduced by the prosecution to prove its case-in-aggravation and to persuade the jury to impose a death sentence was constitutionally inadmissible under the Fifth Amendment, and this evidence had a prejudicial impact on the jury's deliberations. The fact that the state satisfied its burden of proving one statutory aggravating circumstance with untainted evidence does not "suffice" to erase the prejudicial impact of the constitutional error.

How does the Fourth Circuit explain its contrary conclusion? It fails to offer any explanation at all. In lieu of an explanation, the Court merely offers a quotation from this Court's opinion in *Zant* v. *Stephens*, 462 U.S. at 884:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance in "invalid" in the sense that it is insufficient itself to support the death penalty.

This quotation, which constitutes the sum total of the Fourth Circuit's treatment of *Zant* v. *Stephens*, was taken out of context, omits important limiting language, and fundamentally distorts this Court's ruling.

B. This Court's Ruling In Zant v. Stephens.

The issue in *Zant* v. *Stephens*, as stated by this Court, was:

> [W]hether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld.

462 U.S. at 864. The Court noted at the outset of its analysis that:

> The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

Id.

Stephens' death sentence had been imposed on the basis of three aggravating circumstances: (1) that Stephens had a "substantial history of serious assaultive criminal convictions"; (2) that the offense was outrageously or wantonly vile, horrible or inhuman; and (3) that the offense was committed by someone who had escaped from custody.

In support of the first circumstance, the State offered evidence concerning Stephens' prior criminal record—two counts of armed robbery, five counts of burglary, and one count of murder.

While Stephens' case was pending in the Georgia Supreme Court, that court ruled that the first aggravating circumstance was fatally vague. When Stephens' case was heard, his death sentence was affirmed by the Georgia Supreme Court on the basis of the two remaining aggravating circumstances.

The Fifth Circuit reversed, concluding that the death penalty was invalid because the jury had based its death sentence in part on an invalid aggravating circumstance. This Court summarized the Fifth Circuit's reasoning as follows:

> The Court of Appeals gave two reasons for that conclusion. First, it read *Stromberg* v. *California*, 283 U.S. 359 (1931), as requiring that a jury verdict based on multiple grounds must be set aside if the reviewing court cannot ascertain whether the jury relied on an unconstitutional ground. . . .
>
> Second, it believed that the presence of the invalid circumstance "made it possible for the jury to consider several prior convictions of [respondent] which otherwise would not have been before it." 631 F.2d 397, 405-406 (CA5 1980).
>
> In a petition for rehearing, the State pointed out that the evidence of respondent's prior convictions would have been admissible at the sentencing hearing even if it had not relied on the invalid circumstance. The Court of Appeals then modified its opinion by deleting its reference to the possibility that the jury had relied on inadmissible evidence. 648 F.2d 446 (CA5 1981). It maintained, however, that the reference in the instructions to the invalid circumstance "may have unduly directed the jury's attention to his prior convictions." The court concluded, "It cannot be

> determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty."

Zant v. *Stephens*, 462 U.S. at 868-869.

Because the Fifth Circuit had acknowledged that no inadmissible evidence had been introduced at the sentencing hearing, this Court's reversal of the judgment hinged on two determinations—that the Fifth Circuit had misunderstood *Stromberg*, and that the instruction on the improper aggravating circumstance did not materially affect the jury's deliberations.

This Court first analyzed *Stromberg*, finding two possibilities for error:

> [First,] a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground. . . .
>
> [Second,] the reasoning of *Stromberg* encompasses a situation in which the general verdict on a single-count indictment or information rested on *both* a constitutional and an unconstitutional ground.

Zant v. *Stephens*, 462 U.S. at 881-882.

The Court concluded that the second rule applied only to cases in which the punishment was being imposed or heightened because the defendant had exercised his First Amendment rights, and that Georgia's aggravating circumstances did not involve any constitutionally protected activity. Therefore there was no *Stromberg* infirmity:

> [A] death sentence supported by at least one valid aggravating circumstance need not be set aside *under the second Stromberg rule* simply because another aggravating circumstance is "invalid" in the sense that it is insufficient by itself to support the death penalty.

Id. at 884. (emphasis added).[30]

Having disposed of the *Stromberg* issue, the Court went on to consider whether the invalid instruction had a constitutionally prejudicial impact on the jury's deliberations. The Court first noted that the invalid aggravating circumstance pertained to a constitutionally permissible inquiry and that the evidence offered to prove it—Stephens' record of criminal convictions—was otherwise admissible under state and federal law. Thus, the alleged constitutional defect arising from the invalid circumstance related solely to the giving of the instruction itself. The question to be decided was whether the emphasis on Stephens' prior record in the invalid instruction amounted to a constitutional defect in the sentencing process. The Court concluded that it did not, because an instruction directing the jury to take into account the defendant's prior record would be constitutionally permissible. Moreover, the Court observed, the Georgia Supreme Court had properly concluded that the error had "an inconsequential impact on the jury's decision." *Id.* at 889.

This Court meant to be taken at its word when it said, at the outset of the relevant portion of the opinion, that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Id.* at 885. The Court carefully scrutinized the possible impact of the erroneous instruction to ascertain whether the error was of constitutional magnitude.

The critical factor in the Court's analysis was the essentially unobjectionable nature of the evidence adduced to prove the invalid aggravating circumstance—Stephens' record of criminal convictions. The Court emphasized that "the evidence on which the jury might have relied [concerning Stephens' prior

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[30] The underscored portion of this excerpt was left out of the quotation used by the Fourth Circuit in its opinion. As this explanation of its context shows, the omission of the underscored phrase converted a very narrow principle into a sweeping rule of law that far exceeds the ruling of this Court.

record] was properly adduced at the sentencing hearing," *id.* at 887, and that "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be inappropriate to take account of a defendant's prior criminal record in making sentencing determinations. . . ." *Id.* at 888. In other words, the Court emphasized that there was no independent constitutional defect in the proceedings. The Court explicitly endorsed the observation of the Georgia Supreme Court that "[a] different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and therefore the circumstance failed." *Id.* at 890, *quoting* 250 Ga. 97, 101, 297 S.E.2d 1, 4 (1982). Moreover, the Court also noted that counsel for Georgia had acknowledged that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." 462 U.S. at 887, n.24. Finally, the Court specifically emphasized the limited nature of its holding when it stated that "[w]e need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." *Id.*

Most other courts that have interpreted *Zant* v. *Stephens* have not been faced with the specific issue presented here—where the error alleged in the capital sentencing proceeding was the introduction of constitutionally inadmissible evidence. The Delaware Supreme Court recognized this distinction:

> The *evidence* considered by the jury in making its determination was *not constitutionally objectionable*. Therefore, we deem any error in considering the invalid statutory aggravating circumstance as harmless.

Flamer v. *State*, 490 A.2d 104, 136 (Del. 1984) (emphasis added). Likewise, the Eleventh Circuit has read and understood *Zant* v. *Stephens:*

> In *Stephens* the Court held that the *underlying evidence* introduced by the invalid factor was properly admissible at the sentencing hearing under both Georgia law *and the United States Constitution.*

Ritter v. *Smith*, 726 F.2d 1505, 1518 (11th Cir. 1984) (emphasis added).[31]

Where constitutionally inadmissible evidence has tainted a capital sentencing hearing, this Court must be convinced beyond a reasonable doubt that the error did not contribute to the defendant's death sentence. *Chapman* v. *California*, 386 U.S. 18 (1967). *See Cape* v. *Francis*, 741 F.2d 1287, 1294 (11th Cir. 1984); *Gholson* v. *Estelle*, 675 F.2d 734, 745 (5th Cir. 1982) (Dyer, J., specially concurring).

In Michael Smith's case, the jury's finding of an aggravating circumstance and its decision to recommend a death sentence were demonstrably influenced by constitutionally inadmissible evidence. Unlike the instructional error in *Zant* v. *Stephens*, the admission of Dr. Pile's testimony in violation of the Fifth Amendment "can [] fairly be regarded as a constitutional defect in the sentencing process." *Id.* at 889. Nothing in *Zant* v. *Stephens* even remotely suggests that the federal courts should ignore an evidentiary error of independent constitutional magnitude simply because an untainted finding established an adequate statutory predicate for a death sentence.

The Fourth Circuit's reading of *Zant* v. *Stephens* is both breathtaking in its implications and unprecedented. Under the Fourth Circuit's interpretation, any evidentiary error, no matter how prejudicial in fact, would be regarded as constitutionally harmless unless it tainted every aggravating circumstance.[32] Counsel have been able to identify only one

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[31] A death sentence was reversed in *State* v. *Williams*, 690 S.W.2d 517 (Tenn. 1985), because the "vileness" aggravating circumstance could only be supported by an unconstitutional statement of a non-testifying codefendant, the admission of which against Williams violated *Bruton* v. *United States*, 391 U.S. 123 (1968).

[32] Consider, for example, the error occurring in *Estelle v. Smith*, 451 U.S. 454 (1981), where psychiatric testimony was unconstitutionally admitted to prove a future dangerousness circumstance identical to that found in the Virginia statute. In Texas, the dangerousness finding is a necessary predicate for a death sentence and is also the vehicle for introduction of mitigating evidence. However, suppose that the facts occurring in *Estelle* v. *Smith* had occurred in Virginia—the same surprise examination without notice to coun-

other case—a recent decision of the Virginia Supreme Court—relying upon a similar interpretation.[33] This Court should reverse the erroneous judgment of the Fourth Circuit.

CONCLUSION

This Court should rule that Dr. Pile's testimony was constitutionally inadmissible, and should hold, as has almost every court that has considered the issue, that evidence derived from a pretrial mental evaluation requested by the defense may not be used affirmatively by the prosecution to prove the elements of its case. This ruling is necessary to assure that defendants have meaningful access to the expert evaluation and assistance to which they are constitutionally entitled under *Ake* v. *Oklahoma*. Unless the prosecution is barred from making affirmative use of evidence derived from the evaluation, the defendant is unfairly required to choose between his right to an adequate mental evaluation and his privilege against self-incrimination.

This Court should also rule that Dr. Pile's testimony was not harmless beyond a reasonable doubt because of the significant likelihood that it contributed to the jury's finding of the "future dangerousness" aggravating circumstance and that the dangerousness finding influenced the jury's decision to recommend

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sel and without any effort to protect Smith's right not to "be made the 'deluded instrument' of his own execution." 451 U.S. at 462. Would this Court have regarded the violation of Smith's Fifth Amendment rights as harmless simply because the jury found both dangerousness and vileness as aggravating circumstances?

[33] In *Tuggle* v. *Commonwealth*, 229 Va. ____, 334 S.E.2d 838 (1985) the Virginia Supreme Court acknowledged, after remand from this Court, see *Tuggle* v. *Virginia*, 471 U.S. ____, 85 L.Ed.2d 835 (1985), *vacating and remanding* 228 Va. 493, 323 S.E.2d 539 (1984), that the trial court's refusal to allow Tuggle to obtain a private psychiatric evaluation to rebut the Commonwealth's use of expert testimony to prove future dangerousness was constitutionally erroneous under *Ake* v. *Oklahoma*. However, the court ruled that this error was harmless because it did not taint the jury's finding of "vileness." The Virginia Supreme Court therefore rejected the Attorney General's concession that Tuggle was entitled to a new sentencing hearing, and reaffirmed the death sentence. 334 S.E.2d at 846 n.5.

death sentence. The Court should also hold that nothing in its decision in *Zant* v. *Stephens* suggests that a prejudicial constitutional defect in the capital sentencing process should be ignored simply because the state proved an untainted statutory predicate for a death sentence.

Accordingly, this court should reverse the judgment of the Fourth Circuit and set aside Michael Smith's sentence of death.

Respectfully submitted,

*J. LLOYD SNOOK, III
230 Court Square
Charlottesville, Virginia 22901
804-293-8185

RICHARD J. BONNIE
University of Virginia School of Law
Charlottesville, Virginia 22901

** Counsel of Record*
Counsel for Petitioner

APPENDIX

APPENDIX A

States Prohibiting Affirmative Prosecutorial Use Of Disclosures Made By Defendants In All Court-Ordered Mental Examinations, Whether Requested By Prosecution Or Defense.

ALA. CT. R. CRIM. PROC. 5(B)2.

ARIZ. CT. R. CRIM. PROC. 11.7(b).

CALIF.: *People* v. *Slone*, 76 Cal. App. 3d 611, 143 Cal. Rptr. 61 (1978); *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *People* v. *Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982).

HAWAII REV. STAT. § 704-416 (1976).

IDAHO CODE § 18-215 (Supp. 1985).

IND.: *Phelan* v. *State*, 273 Ind. 542, 406 N.E.2d 237 (1980).

IOWA: *State* v. *Craney*, 347 N.W.2d 376 (1975).

MASS. GEN. LAWS ANN. ch. 233 § 23(B) (West Supp. 1985).

MICH. COMP. LAWS ANN. § 768.20(A) (West Supp. 1985).

MINN. CT. R. CRIM. PROC. 20.02(6).

MISS.: *Williamson* v. *State*, 330 So. 2d 272 (1976).

MO. ANN. STAT. 552.030(6) (Vernon Supp. 1985).

NEV.: *McKenna* v. *State*, 98 Nev. 38, 639 P.2d 557 (1982).

N.M. CT. R. CRIM. PROC. DIST. CT. 35(D).

N.Y. CRIM. PROC. LAW § 60.55(2) (McKinney Supp. 1984-1985).

N.D. R. CRIM. PROC. 12.1(c) (Supp. 1985).

OHIO REV. CODE ANN. § 2945.39 (Page 1982).

VT. STAT. ANN. tit. 13 § 4816 (1974).

VA. CODE § 19 2-169.7 (1983).

APPENDIX B

States Prohibiting Affirmative Prosecutorial Use Of Disclosures Made by Defendants In Court-Ordered Mental Evaluations Requested By The Prosecution.

1. Evaluations Of Competency To Stand Trial And Mental Condition At Time Of Offense.

COLO. REV. STAT. § 16-8-107 (1973).

CONN.: *State* v. *Fair*, 197 Conn. 106, 496 A.2d 461 (1985).

DEL.: *McCarthy* v. *State*, 372 A.2d 180 (1977); *State* v. *Mulrine*, 55 Del. 65, 183 A.2d 831 (1962).

ILL. ANN. STAT. ch. 38, § 115-6 (Smith-Hurd Supp. 1985).

N.J.: *State* v. *Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965).

OKLA.: *Noyes* v. *State*, 516 P.2d 1368 (1973).

PA.: *Commonwealth* v. *Pomponi*, 447 Pa. 154, 284 A.2d 708 (1971).

S.C.: *State* v. *Meyers*, 220 S.C. 309, 67 S.E.2d 506 (1951).

S.D. CODIFIED LAWS ANN. § 23A-10-4 (1979).

TENN. CT. R. CRIM. PROC. 12.2(c).

W.VA. CT. R. CRIM. PROC. 12.2(c).

D.C.: *White* v. *United States*, 451 A.2d 848 (1982).

2. Evaluations Of Competency To Stand Trial Only

FLA. CT. R. CRIM. PROC. 3.211(e).

KAN. STAT. ANN. § 22-3302(3) (Supp. 1984).

LA.: *State* v. *Breaux*, 337 So. 2d 182 (1976).

N.J. STAT. ANN. § 2C:4-10 (1982).

R.I. GEN. LAWS § 40.1-5.3-3(J) (1984).

TEX. CRIM. PROC. CODE § 46.02(3)g (Vernon 1979).

APPENDIX C

Decisions Holding That Defense-Requested Mental Evaluations Are Protected By The Attorney-Client Privilege.

ALASKA: *Houston* v. *State*, 602 P.2d 784 (1979).

* CALIF. *People* v. *Lines*, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975).

* CONN.: *State* v. *Toste*, 178 Conn. 626, 424 A.2d 293 (1979).

FLA.: *Pouncy* v. *State*, 353 So. 2d 640 (1977).

MD.: *State* v. *Pratt*, 284 Md. 516, 398 A.2d 421 (1979).

* N.J.: *State* v. *Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957).

N.Y.: *People* v. *Edney*, 39 N.Y.2d 620, 350 N.E.2d 400, 385 N.Y.S.2d 23 (1976). See also *Edney* v. *Smith*, 425 F.Supp. 1038, *aff'd without op.* 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1976).

S.C.: *State* v. *Hitopoulous*, 279 S.C. 549, 309 S.E.2d 747 (1983).

TEXAS: *Ballew* v. *State*, 640 S.W.2d 237 (1980).

* WASH.: *State* v. *Jones*, 99 Wash. 2d 735, 664 P.2d 1216 (1983).

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* Explicitly applies to court-ordered evaluations conducted for indigent defendants.

APPENDIX D

States In Which Physician-Patient, Psychologist-Patient Or Psychotherapist-Patient Privileges Protect Disclosures Made By Criminal Defendants During Pretrial Mental Evaluations.

ALA.: *Ex Parte Day*, 378 So.2d 1159 (1979).

* ARIZ.: *State* v. *Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009 (1971); *State* v. *Evans*, 104 Ariz. 434, 454 P.2d 976 (1969).

ARK. STAT. ANNN. § 28-1001, R. EVID. 503 (1977).

CAL. EVID. CODE §§ 952, 954, 1017 (West Supp. 1985).

* COLO.: *People* v. *Rosenthal*, 617 P.2d 551 (1980).

DEL.: *McKinney* v. *State*, 466 A.2d 356 (1983); DEL. CODE ANN. tit. 16, UNIF. R. EVID. 503 (1974).

* HAWAII REV. STAT. § 626-1, R. EVID. 504.1 (Special Pamphlet 1980).

* ILL.: *People* v. *Newbury*, 53 Ill.2d 228, 290 N.E.2d 592 (1972).

KY. STAT. ANN. § 421.215 (1972).

* ME. CT. R. EVID. 503(c).

* MO.: *State* v. *Speedy*, 543 S.W.2d 251 (1976); MO. ANN. STAT. § 491.060(5) (Vernon Supp. 1985).

* N.H.: *State* v. *Kupchin*, 117 N.H. 412, 373 A.2d 1325 (1977).

TENN. CODE ANN. § 24-1-207 (1980).

UTAH CODE ANN. § 58-25-8 (Supp. 1985).

WISC. STAT. ANN. § 905.04(4) (West Supp. 1985).

WYO. STAT. § 33-27-103 (1977).

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* Explicitly applies to court-ordered evaluations for indigent defendants.

Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF, Director,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

WILLIAM G. BROADDUS
Attorney General of Virginia
JAMES E. KULP*
Senior Assistant Attorney General
FRANK S. FERGUSON
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6565

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Petitioner is entitled to have his Fifth Amendment claim considered by federal courts where he failed to raise the claim pursuant to state procedural rules.

2. Whether the Fifth Amendment is implicated when the state introduces testimony of Petitioner's volunteered statement to a private psychiatrist.

3. Whether the Circuit Court applied the holding in *Zant v. Stephens*, 462 U.S. 862 (1983) correctly in affirming Petitioner's sentence of death.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 753 F.2d 342 (1985) and is reproduced in the Joint Appendix, pages 160-166.

JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is based upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Michael Marnell Smith was convicted by a jury on November 2, 1977, of the capital murder and rape of Audrey Jean Weiler. The following day, pursuant to the bifurcated trial procedure, the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's verdict and entered final judgment on November 30, 1977.

The Supreme Court of Virginia granted Smith an automatic appeal, and after full briefing and argument, affirmed his conviction and sentence of death in a written opinion on October 6, 1978. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). This Court denied a petition for a writ of certiorari on May 21, 1979. 441 U.S. 967 (1979).

Smith thereafter filed a petition for a writ of habeas corpus in the state trial court. The state habeas court denied Petitioner's Fifth Amendment claim on the ground it was procedurally barred. An evidentiary

hearing on Petitioner's claim of ineffective assistance of counsel was conducted by the trial court on November 8, 1979, and the trial court issued written findings of fact and conclusions of law denying Smith's petition on March 14, 1980.

The Supreme Court of Virginia denied Smith's appeal on April 24, 1981, and this Court again denied certiorari on December 14, 1981. 454 U.S. 1128 (1981).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court on June 28, 1982. The petition was referred to a United States Magistrate who issued several reports and recommended the petition be denied. After reviewing Petitioner's objections to the Magistrate's various reports, the District Court entered an order on December 4, 1984, denying the petition. The District Court specifically found that Petitioner's Fifth Amendment claim was procedurally barred.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas corpus in an opinion of May 10, 1985. A petition for rehearing and suggestion for rehearing *en banc* were denied on June 26, 1985, no member of the Court requesting a poll on the suggestion for rehearing *en banc*. This Court granted certiorari on October 21, 1985. *Smith v. Sielaff*, 106 S.Ct. 245 (1985).

STATEMENT OF FACTS[1]

In the early afternoon of May 23, 1977, the Petitioner, Michael Marnell Smith left his home and

[1]Petitioner is not challenging the legality of his conviction. (Br. 3). The facts concerning the offense will be stated briefly to allow the Court to be familiar with the offense.

went for a walk on a beach beside the James River in James City County, Virginia. While walking, Petitioner observed Audrey Jean Weiler, also on the beach. He approached Mrs. Weiler, and after a short conversation, put his arm around her waist and forced her into a wooded area. Petitioner then produced a knife and ordered Mrs. Weiler to disrobe. (J.A. 52,58). Disregarding her pleas to be left alone, Petitioner raped her. Following the rape, Petitioner began to choke Mrs. Weiler with his hands as she begged for her life. (J.A. 58-59). Eventually she went limp, and Petitioner dragged her into the water where he submerged her head. Finally, he stabbed her in the back several times. A subsequent medical examination indicated that death was attributable to three clusters of lethal injuries: asphyxia from strangulation, drowning, and multiple stab wounds. (J.A. 52).

Two days later, police investigators went to the Gospel Spreading Church Farm where Petitioner lived and worked. Upon being advised that he was a suspect, Petitioner confessed to committing the crimes, saying that he had killed Mrs. Weiler because he feared she "could send [him] back [to the penitentiary]". (J.A. 61, 63).

On May 26, 1977, David F. Pugh was appointed to represent Petitioner. During his initial conversation with Petitioner and before any psychiatric examinations, counsel advised Petitioner not to discuss with anyone any offenses that he may have committed that had not been reported. (J.A. 128,129). Mr. Pugh requested a psychiatric examination to determine Petitioner's competency to stand trial. (J.A. 127). That examination was done by Dr. Palmaz, who was of the opinion that Petitioner was competent to stand trial.

Upon Mr. Pugh's request for an additional examination, Petitioner was hospitalized at the Forensic Unit of Central State Hospital from July 5 to August 23, 1977. (J.A. 12, 127). Dr. James C. Dimitris examined Petitioner at that hospital and advised him at the outset that any statements made by him during the course of the psychiatric examination could be used against him at trial. (J.A. 113).

Defense counsel then requested the court to allow Petitioner to be examined by Dr. Wendell Pile, a private psychiatrist chosen by the defense. The trial court granted the motion by order dated September 28, 1977. (J.A. 1-2, 131). During the course of Dr. Pile's examination, Petitioner was asked if he had raped anyone before the present crime. Petitioner replied that his attorney had told him not to discuss any prior criminal activity not related to the present offenses. (J.A. 43, 92). Dr. Pile thereafter never sought any information from Petitioner relating to prior criminal conduct. (J.A. 92). Later in the interview Petitioner voluntarily reported an incident involving an assault many years earlier on a girl on a school bus where he tore her clothing. (J.A. 44, 92).

During the penalty phase of Petitioner's trial, the prosecutor called Dr. Pile to testify concerning the school bus incident. (J.A. 3-6). Petitioner's counsel objected to the introduction of this evidence, but did not raise this issue on appeal to the Supreme Court of Virginia.

SUMMARY OF ARGUMENT

Petitioner's Fifth Amendment claim is not properly before this Court due to procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Petitioner con-

cedes this claim was not raised pursuant to state procedural rules. The district court refused to consider this claim on the merits due to procedural default, and the Circuit Court did not find this ruling erroneous. The Circuit Court did not decide the merits of Petitioner's claim, and this Court should not reach Petitioner's claim in the interests of comity, federalism and the orderly administration of justice.

The Fifth Amendment is not implicated when a defendant volunteers information to a private psychiatrist from whom he has requested an examination. *Estelle v. Smith*, 451 U.S. 454 (1981). Petitioner was advised of his right to remain silent, and that his statements could be used against him. His volunteered statement to a private psychiatrist was not the result of any compelling influence.

Petitioner has shifted the focus of the claim he presented in the district court so that it is no longer recognizable. He is requesting a new rule with far reaching implications. Since the Circuit Court did not deal with Petitioner's claims, this Court is left without any opinion from the lower court. This Court should not decide issues which were not considered by the Court of Appeals.

The jury in Petitioner's case found the presence beyond a reasonable doubt of two separate and distinct aggravating circumstances. The prosecution introduced the testimony of Petitioner's private psychiatrist during the sentencing phase that Petitioner had committed an assault fifteen years before. This testimony was directed toward the dangerousness aggravating circumstance and did not bear upon the jury's separate finding that the crime was vile. Assuming the psychiatrist's testimony was in-

admissible, the remaining evidence was sufficient to support the finding of dangerousness.

A review of the evidence leads to the conclusion that the jury would not have found the state's case significantly less persuasive had the psychiatrist's testimony been excluded. The questioned testimony was neither misleading nor inaccurate, and the jury's sentence was not based upon an arbitrary factor.

Even if the Court of Appeals did not utilize the harmless error analysis of *Zant v. Stephens*, 462 U.S. 862 (1983), this Court is in the position to do so.

ARGUMENT I

PETITIONER'S CLAIMED VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION IS BARRED FROM CONSIDERATION ON FEDERAL HABEAS CORPUS REVIEW UNDER THIS COURT'S DECISION IN *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977).

During the sentencing phase of Petitioner's capital murder trial, the Commonwealth called Dr. Pile to testify regarding Petitioner's admission that he had assaulted a girl on a school bus. (J.A. 3-6). Counsel objected to the introduction of that testimony, but the trial court permitted it to be presented. Despite his objection at trial, the Petitioner did not assign this issue as error on appeal to the Supreme Court of Virginia.[2]

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[2]Petitioner concedes that this issue was never presented to the Supreme Court of Virginia. (Br. 8). Petitioner notes that this issue was discussed in an *Amicus* brief. The Supreme Court of Virginia was unmistakable in its ruling that it would not consider any arguments by *Amicus* which had not been raised

The Commonwealth of Virginia has a rule requiring counsel to assign the errors upon which reversal is sought in the petition for appeal.[3] Rule 5:21 (now 5:17 and 5:25), *Rules of the Supreme Court of Virginia*, provided, in part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice. *Only errors assigned in the petition for appeal will be noticed by this court* and no error not so assigned will be admitted as a ground for reversal of a decision below. (Emphasis added).

This Court has established the doctrine that federal courts may not take cognizance of constitutional issues which could have been but were not raised before the state courts when the state procedural bar requires that such matters be raised in order for them to be considered. *Wainwright v. Sykes*, 433 U.S. 72 (1977).[4] The Supreme Court of Virginia's Rule 5:21

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at trial and not addressed by Petitioner on appeal. (J. A. 51 n. 1). An *Amicus* cannot expand the issues or arguments raised by the parties. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n. 13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1964).

[3]The rules of the Supreme Court of Virginia refusing to reverse a case upon errors not raised in the petition for appeal is similar to this Court's Rule 34(1)(a).

[4]The *Sykes* doctrine is applicable when the state's procedural rule requires an issue to be specifically raised on appeal before it can be considered. *See Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980); *Norris v. Wainwright*, 588 F.2d 130 (5th Cir. 1979); *Forman v. Smith*, 633 F.2d 634, 640 (2nd Cir. 1980), *cert. denied*,

is such a procedural rule. The *Sykes* doctrine arose from the court's concern for comity, federalism and the orderly administration of justice. This Court was of the opinion that federal courts should not be reviewing issues years after the trial when a defendant has failed to follow the state's procedural requirements. *Id.*

The admissibility of Dr. Pile's testimony was not addressed by the Supreme Court of Virginia because it was not assigned as error or briefed by Petitioner.[5] A federal court may not later adjudicate such a constitutional claim unless there was justifiable cause for the default and actual prejudice resulting from it. *Wainwright v. Sykes, supra* at 87. The burden to establish cause and prejudice rests upon the petitioner who alleges it.

During the state habeas hearing, Petitioner's trial attorney was asked why the now asserted Fifth Amendment claim was not raised on appeal in the Supreme Court of Virginia. He responded by saying:

> We had the various objections that we were going to raise to the Supreme Court of Virginia, sort of underlined each objection that we made during the course of the trial, thinking to make that an appealable point, and we didn't find—*we*

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450 U.S. 1001 (1981); *Leroy v. Marshall*, 757 F.2d 94, 95 (6th Cir. 1985); *Holcomb v. Murphy*, 701 F.2d 1307 (10th Cir.), *cert. denied*, 103 S.Ct. 3546 (1983).

[5]Petitioner attempted to raise this Fifth Amendment claim in his state petition for a writ of habeas corpus. The state habeas court refused to consider this claim due to Petitioner's procedural default. (J.A. 153-154). The Supreme Court of Virginia also refused to consider this claim on appeal of the habeas proceeding.

> *didn't think at that time there was any merit to that particular claim.* (J.A. 143). (Emphasis added).

Mr. Pugh further testified that although he did not personally research federal law relating to this issue, research was conducted which might have included federal case law. The results of the research were discussed among counsel, and a deliberate decision was made not to raise this particular issue on appeal. (J.A. 143). This Court has held that appellate counsel should review the record to select the most promising issues for appeal, and it is not expected that every nonfrivolous point will be raised. *Jones v. Barnes*, 463 U.S. 745(1983).

At the time of Petitioner's trial, counsel was aware of controlling authority in Virginia holding that Dr. Pyle's testimony was admissible. *See Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975). Thus, counsel had a valid and substantial basis for the belief that the issue would not be successful on appeal. Such reasonably perceived futility cannot satisfy the "cause" prong of the *Wainwright v. Sykes* test. This Court has held that "[s]ince the cause and prejudice standard is more demanding than Fay's deliberate bypass requirement...we are confident that perceived futility alone cannot constitute cause." *Engle v. Isaac*, 456 U.S. 107, 130 n. 36 (1982). The United States District Court found that Petitioner's claim was clearly barred under both this Court's decision in *Sykes*, and the Court of Appeal's decision in *Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc*, 754 F.2d 520, *cert. granted, sub nom. Carrier v. Sielaff*, 105 S.Ct. 3523 (1985), because the default resulted not from the trial attorney's ignorance or

inadvertence, but because of a deliberate tactical decision. (J.A. 158). The Court of Appeals never found this ruling to be erroneous.

Nor can Petitioner establish cause for the default through alleging counsel's ineffectiveness. In its decision in this case, the Court of Appeals noted that "[a]t the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November, 1977, was not certain." (J.A. 162). Both the Fifth and Eleventh Circuits have held that the failure of counsel to anticipate *Estelle v. Smith*, 451 U.S. 454 (1981), and timely enter an objection to similar testimony, did not constitute ineffective assistance of counsel. *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1099 (1983); *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir.), *cert. denied*, 105 S.Ct. 355 (1984).

Petitioner's counsel raised seventeen issues on direct appeal and deliberately chose to omit the Fifth Amendment claim now before this Court while pursuing other avenues of defense. The choice was made with a sound underlying tactical basis. As such, counsel's decision should not be the subject of judicial second-guessing. *See Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052 (1984); *Sallie v. North Carolina*, 587 F.2d 636 (4th Cir. 1978). "[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim."

Engle v. Isaac, supra at 134.

Moreover, the introduction of Dr. Pile's testimony was so insignificant in view of the evidence of ag-

gravation that it was harmless beyond a reasonable doubt (see Argument III *infra*). It logically follows that failure to raise the issue on appeal does not provide the necessary prejudice to satisfy the second prong of the *Sykes* test.

Petitioner suggests that the Court of Appeals in choosing to address the merits of his Fifth Amendment claim, implicitly ruled that Petitioner had demonstrated sufficient "cause" and "prejudice" to satisfy the requirements of *Sykes*. (Br. 9). A reading of the Circuit Court's opinion does not support Petitioner's assertion. The Circuit Court never addressed the Fifth Amendment claim and simply chose not to reach the state's claim of procedural default since in the Court's opinion the Petitioner was not entitled to relief. (J.A. 163). The Circuit Court specifically noted that there existed a question whether the representation of trial counsel was, in fact, ineffective or that any prejudice resulted from not having raised this claim on appeal. (J.A. 163). The Court also observed that it was questionable whether counsel for Petitioner could establish that trial counsel's failure to object constituted inexcusable neglect. (J.A. 162). Such statements by the Circuit Court refute Petitioner's assertion that the court assumed sufficient "cause" and "prejudice" to satisfy *Sykes*, or that Dr. Pile's testimony tainted the jury's finding of future dangerousness.

Failure to recognize the procedural bar to consideration of this claim established by the holding in *Wainwright v. Sykes* would seriously damage the principles of comity, federalism and finality upon which that decision was based. The rule is firm and has been applied by this Court in other cases where constitutional claims were defaulted in state court. *See*

e.g. Engle v. Isaac, supra. Absent a showing by Petitioner of cause and prejudice, this claim should not now be considered. Petitioner has failed to establish either cause or prejudice and is thereby barred from having his claim adjudicated in the federal courts. The Court of Appeals for the Fourth Circuit should have found that Smith's Fifth Amendment claim was barred by procedural default. Under the clear pronouncement in *Wainwright v. Sykes, supra,* this Court should dismiss Petitioner's claim.

ARGUMENT II

THE EVIDENCE PRESENTED BY DR. PILE WAS ADMISSIBLE AND DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

Following Petitioner's arrest, he was examined for competency by Dr. Palmaz. Prior to any psychiatric examinations, counsel advised Petitioner not to discuss prior offenses with anyone. (J.A. 128,129). On request of the defense, further examination was performed by Dr. James C. Dimitris at Central State Hospital. (J.A. 127, 42) During the examination conducted by Dr. Dimitris, Petitioner was advised that he could say whatever he wanted as long as he understood his statements would be a part of record and the record will be used one day against him in a court of law. (J.A. 113) Following Dr. Dimitris' examination, defense counsel requested still more testing by a psychiatrist of his own choosing, Dr. Wendell J. Pile. The court granted that request and entered an order permitting payment of Dr. Pile from state funds. (J.A. 1-2) Prior to Dr. Pile's examination, counsel once again advised Petitioner not to discuss

prior offenses with anyone. (J.A. 133). During Dr. Pile's examination of Petitioner, the doctor asked if Petitioner had ever raped anyone before to which Petitioner replied that his counsel had told him not to discuss prior offenses. (J.A. 43) Notwithstanding his understanding of his counsel's advice, Petitioner later volunteered the information concerning the school bus incident. This information was not given in response to a question from Dr. Pile but was made gratuitously by Petitioner. (J.A. 92) Moreover, defense counsel testified at the state habeas hearing that in view of the repeated advice Petitioner had been given about not discussing prior offenses with anyone, counsel believed Petitioner would heed that advice. (J.A. 129-130, 132-133)

It is clear that Petitioner was well aware of his constitutional right against self-incrimination. It is equally clear that he was aware that any statement made to Dr. Pile could be used against him at his subsequent trial. Petitioner had been adequately warned by both his attorney and Dr. Dimitris. On this evidence the state habeas judge found:

> Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination. (J.A. 145)[6]

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[6]Although Petitioner was present at the state plenary hearing

In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court recognized that an evaluation of a criminal defendant by a psychiatrist implicated both the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.[7] This Court was concerned with the introduction of a court-appointed psychiatrist's testimony to prove a capital defendant's future dangerousness, based on information gleaned from a custodial examination of the accused who had neither requested the examination nor introduced psychiatric evidence on the issue. Moreover, he had not been warned of his right to remain silent and that any statement he made could be used against him at sentencing. In view of these critical facts, this Court held that introduction of the evidence violated the accused's Fifth Amendment rights. The instant case is clearly distinguishable. The record plainly shows that the examination was requested by and for the defense, and Dr. Pile was chosen not by the state or the court but by defense counsel.[8] Significantly, Petitioner had repeatedly been warned of his rights prior to volunteering this information to his psychiatrist.[9]

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he chose not to testify. Therefore the evidence as to the warnings he received stands uncontradicted.

[7]In this case the Sixth Amendment concerns expressed by this Court in *Estelle v. Smith* are not present. Petitioner not only had counsel but it was Petitioner's counsel who advised that Petitioner be examined by Dr. Pile.

[8]Petitioner was the moving party for this examination, but since he was indigent, the trial court entered an order to allow payment to Dr. Pile. Such a circumstance cannot be construed to change this private psychiatric examination into a court-ordered examination referred to in *Estelle v. Smith*.

[9]Petitioner argues that he can prevail even if this Court were

Under circumstances strikingly similar to those present in this case, the court in *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984), held that no Fifth Amendment claim existed. In that case, the defendant took the stand in his own defense and testified that he was home sleeping off a drunk at the time of the murder. The state called Dr. Niswonger, a psychiatrist who had examined the defendant before trial. Dr. Niswonger testified that during the examination the defendant had claimed amnesia concerning the events of the murder. The state then argued to the jury that the doctor's testimony contradicted the defendant's alibi that he was home during the murder. The defendant contended that under *Estelle v. Smith, supra*, Dr. Niswonger's testimony was inadmissible. In rejecting that argument the Court of Appeals for the Eleventh Circuit stated:

> The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in *Estelle v. Smith*. On the contrary, Smith retained Niswonger (through

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to hold that a defendant who requests a pretrial mental evaluation waives his privilege against self-incrimination by speaking to the examiner. His thesis is that *Estelle v. Smith* requires the examiner to give proper warnings, and since Dr. Pile gave no warnings, his testimony was inadmissible. (Br. 22 n. 14). This Court's decision in *Estelle v. Smith* did not turn on the fact that the examiner did not give the defendant warnings. The decision rested upon the fact that the defendant received no warnings. In this case Petitioner was warned repeatedly by his attorney not to discuss prior criminal conduct with anyone. The warning from one's attorney would be expected to have more force than a similar warning from an examiner. It was the absence of warnings, not who gave the warnings, which was the crux of *Estelle v. Smith*.

> his trial counsel) to conduct an examination regarding a possible claim of insanity. In such a case, *Estelle v. Smith* does not require that the psychiatrist give *Miranda* warnings. The protections of *Estelle* do not apply unless the psychiatrist is 'essentially . . . an agent of the state. . . .' 451 U.S. at 467.

741 F.2d at 1258, 1259.

Furthermore, in *Estelle v. Smith*, this Court reaffirmed that ". . . *volunteered* statements . . . are not barred by the Fifth Amendment." 451 U.S. at 469. (Emphasis added.) In this case, the state habeas court has found, upon the evidence, that Petitioner had been carefully advised by his attorney not to discuss with anyone any prior offenses and that Petitioner clearly understood that warning. Notwithstanding his attorney's advice, Smith voluntarily told Dr. Pile about the bus incident.

Under the facts of this case, Petitioner's revelation about the bus incident was given freely and voluntarily without any compelling influence to a private psychiatrist who was not an agent of the state.[10] Under such circumstances, Dr. Pile's testimony was admissible and Petitioner's Fifth Amendment rights were not violated.

In his brief Petitioner is urging this Court to limit the decision in *Estelle v. Smith* to pretrial mental examinations requested by the prosecution and to develop a new body of law relating to such examinations requested by the defendant. This shift in Petitioner's

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[10]There exists no physician-patient privilege in a criminal prosecution in Virginia. *See Gibson v. Commonwealth, supra.*

position is so extreme as to leave the claim presented in his federal petition for a writ of habeas corpus unrecognizable. The entire thrust of Petitioner's claim in his petition was that Dr. Pile's testimony was inadmissible since Petitioner had not been warned about the consequences of his statements. (J.A. 150-152).

Neither the district court nor the Court of Appeals addressed the issue which Petitioner is presenting to this Court. This Court should refrain from deciding this issue which will obviously have far reaching implications when the record has not been developed in the courts below. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1969). Since the Court of Appeals did not decide the issue Petitioner is pursuing before this Court, the Court is left without a lower court opinion on the legal issue. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163 (1975).

Many questions remain unanswered concerning the position Petitioner is espousing.[11] What role does the Fifth and Sixth Amendments play when the state plans to use the results of a pretrial evaluation on issues other than the defendant's future dangerousness? *See* Slobogin, "Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation," 31

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[11]Some of the cases upon which Petitioner relies do not support his position. *See* e.g. *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), where the Circuit Court would not obviate the necessity for giving the *Miranda* warnings when the defense requested the examination. Also the court in *United States v. Castenada*, 557 F.2d 605 (7th Cir. 1977), allowed the government to use the testimony of a mental health expert to impeach the defendant's testimony.

Emory L.J. 71, 76 (1982). What if a defendant tells the examiner that he has amnesia concerning the events surrounding the crime, but later testifies that he was at home sleeping off a drunk? Can the prosecution call the mental health expert to impeach the defendant's alibi testimony?[12] *See Smith v. Wainwright, supra.* Suppose a defendant seeks an examination to determine the question of sanity at the time of the offense for which he stands charged, and during the examination gratuitously confesses to the commission of a totally unrelated crime? Can the prosecution call the mental health expert to testify to the defendant's confession? Suppose a defendant consults a mental health expert who renders a discouraging opinion based upon the defendant's description of the events surrounding the crime? The defendant then seeks another evaluation and dramatically changes his version of the events. Can the prosecution call the first mental health expert?[13]

A myriad of possibilities can arise with Petitioner's proposed position about which this Court can only speculate. The record in this case leaves the Court unenlightened as to the many implications which would follow the adoption of Petitioner's proposed position. This Court should not attempt to resolve important constitutional issues when the Petitioner

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[12]Petitioner suggests that it might be permissible to use statements of the defendant to a mental health expert to impeach the defendant's testimony if he chooses to testify. (Br. 29 n. 19). Petitioner does not explain, however, when and under what conditions the prosecution would be entitled to this information.

[13]*See* Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists", 66 Va. L. Rev. 597, 629-30 (1980).

has failed to raise the issue below in a manner in which the lower courts can adequately explore the implications of a new rule.[14]

ARGUMENT III

THE TESTIMONY OF DR. PILE WAS INSIGNIFICANT AND DID NOT INFLUENCE THE JURY'S DECISION TO IMPOSE THE DEATH SENTENCE.

Dr. Pile's testimony concerning Petitioner's aborted assault on the girl on the school bus is insignificant when viewed with the other uncontested evidence which was before the jury on the issue of dangerousness.

The Commonwealth introduced evidence that Petitioner had previously been convicted of rape in 1973. The evidence further established that Petitioner had been paroled from the penitentiary on that charge less than four months prior to the rape and murder of Mrs. Weiler. Also before the jury was Petitioner's confession which contained the statement that he killed Mrs. Weiler because he was afraid she "could send [him] back [to the penitentiary]." (J.A. p. 52). Also of importance is the fact that the jury was aware of the heinous nature of the offense itself.[15] Under Virginia law the dangerousness aggravating circumstance can be proven by reference to the circumstances surrounding the commission of the crime. *See* § 19.2-264.4C, Code of Virginia. In *Quintana v. Com-*

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[14]Respondent respectfully suggests that the writ be dismissed as improvidently granted.

[15]The jury was instructed to consider the circumstances surrounding the offense when determining the punishment to be imposed. (J.A. 40).

monwealth, 224 Va. 127, 295 S.E.2d 127 (1982), *cert. denied*, 460 U.S. ___ (1983), the Court said:

> As to the factor that defendant will pose a continuing serious threat to society, we need only refer again to the heinous circumstances surrounding this homicide, committed upon a seventy-two year old woman during the course of robbery. The jury and trial court could properly conclude that if defendant has killed once under these circumstances for the mere purpose of obtaining a sum of money, he is likely to kill again, whether incarcerated or not, for an equally devious purpose.

224 Va. at 151.

A review of closing arguments in the sentencing phase of Petitioner's trial indicates that the school bus assault was only incidental to the prosecution's argument for the death penalty. There were only three passing references to that event in some fourteen pages of argument. (J.A. 30-38).

This Court has recognized that the admission into evidence of a defendant's confession in violation of the Fifth Amendment can be harmless. In *Milton v. Wainwright*, 407 U.S. 371 (1972), this Court held that assuming *arguendo* an involuntary confession was admitted into evidence, such admission was harmless beyond a reasonable doubt, as the jury had before it overwhelming evidence of the defendant's guilt. In so holding, the Court made a cogent observation:

> The writ of habeas corpus has limited scope; the federal courts do not sit to retry state cases de novo but, rather, to review for violation of federal constitutional standards. In that process

> we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court years go by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

407 U.S. at 377, 378.

Similarly, in *Brown v. United States*, 411 U.S. 223 (1973), this Court held as harmless the erroneous admission of a co-defendant's extrajudicial confession implicating the defendant in violation of *Bruton v. United States*, 391 U.S. 123 (1968). The Court, upon an independent examination of the record, concluded that the testimony improperly admitted was merely cumulative of other overwhelming and largely uncontroverted evidence which had been correctly admitted.

Examining the present case in light of the opinions of this Court in *Milton* and *Brown*, it is clear that Dr. Pile's testimony was merely cumulative of the other overwhelming and uncontested evidence properly before the jury. In view of the nature and quantum of the evidence of dangerousness, one can only conclude that the jury would have found the "dangerousness" aggravating circumstance even had Dr. Pile not testified concerning the bus incident.

Moreover, when reviewing alleged error to determine whether there was harm or prejudice, the nature of the evidence itself and of the proceeding in which it is introduced is relevant. There is no argument that the evidence of the school bus incident would not have been admissible had it been presented from some other source such as the victim herself. Thus, the

Commonwealth could present the exact evidence on a resentencing procedure that was presented in the original trial. Accordingly, Petitioner has suffered no prejudice.

It is true, as Petitioner says, that a sentencing procedure is a functional equivalent of a guilt trial, at least so far as the protection of the Fifth Amendment privilege is concerned. *Estelle v. Smith, supra* at 369. However, for the purposes of harmless error analysis, it is important to realize that there is a competing interest of having the jury be aware of a broad range of information and all materials which are relevant to the various predicates upon which the death penalty may be imposed. *Gregg v. Georgia* 428 U.S. 153 (1976). If, as Petitioner argues, the information on the school bus incident was significant, it thus becomes the sort of information which this Court has said should be available to the jury imposing sentence.

Finally, if the jury did take note of the information, it is arguable that it was viewed in a light favorable to Smith. Dr. Pile testified that Smith did not rape the girl because he thought better of it. (J.A. 6). Such testimony indicates the presence of conscience and possible amenability to rehabilitation. Accordingly, it cannot be said with any certainty that the effect of the testimony was entirely negative.

Referring to the application of the harmless-error rule this Court has observed:

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely con-

> sistent with the judge's instructions, stares us in the face.

Schneble v. Florida, 405 U.S. 427, 432 (1972).

When the uncontested evidence of future dangerousness is reviewed it leads to the conclusion that the minds of a jury would not have found the state's case significantly less persuasive had the testimony of Dr. Pile been excluded. *Id.* The admission of Dr. Pile's testimony, therefore, was at most harmless error.

ARGUMENT IV

THIS COURT'S HOLDING IN *ZANT V. STEPHENS*, 462 U.S. 862 (1983) WAS CORRECTLY APPLIED BY THE FOURTH CIRCUIT COURT OF APPEALS AND AFFIRMANCE OF THE DEATH PENALTY IS PROPER DESPITE THE ALLEGED ERROR RESULTING FROM THE TESTIMONY PRESENTED BY DR. PILE.

In *Zant v. Stephens* this Court said:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside...simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient itself to support the death penalty.

462 U.S. at 884. Citing this language, the court below refused to grant Petitioner habeas corpus relief. (J.A. 163-166).

The jury's verdict recommending a death sentence in this case was supported by two separate and distinct grounds of aggravation - 1) dangerousness and 2) vileness. (J.A. p. 163). The Court of Appeals correctly noted that the challenged testimony of Dr. Pile

was directed to the question of "dangerousness." The Court of Appeals also found there was ample unchallenged testimony supporting the jury's finding of the "vileness" basis for the death penalty. (J.A. 164).

Petitioner argues that because the evidence forming the basis for the "dangerousness" finding was constitutionally inadmissible (Dr. Pile's testimony), the *Zant v. Stephens* rule does not apply. At the outset, it is urged that this argument fails for want of proof of the predicate. Contrary to Petitioner's premise, for the reasons discussed in Argument II, *supra*, Dr. Pile's testimony was admissible; therefore, there is no need to view this case in light of *Zant v. Stephens*. However, assuming the evidence was inadmissible for the purposes of this argument, the court below reached the correct result under *Zant v. Stephens*.

In *Zant v. Stephens*, the jury found three aggravating factors upon which the defendant was sentenced to death. Subsequently, one of those aggravating circumstances—"a substantial history of serious assaultive criminal convictions"—was determined to be invalid because it was unconstitutionally vague. Nevertheless, the Georgia Supreme Court concluded that the remaining two aggravating circumstances adequately supported Stephens' sentence of death.

In its analysis, this Court focused upon the reason the aggravating circumstance had been found to be invalid by the Georgia Supreme Court. In doing so, this Court dismissed Stephens' contention that that the rule of *Stromberg v. California*, 283 U.S. 359 (1931), required vacation of the death sentence. The first rule of *Stromberg* is applicable only when a general verdict is returned. Because the jury in *Zant v.*

Stephens expressly found the various aggravating circumstances, the first *Stromberg* rule was not controlling. Likewise, in the case at bar, the jury returned specific findings of aggravating circumstances.

The second rule derived from the *Stromberg* case involves a situation when an aggravating circumstance has been found invalid for an impermissible reason, such as treating constitutionally protected conduct as an aggravating factor. Such a situation is not present in the case at bar; accordingly, the second *Stromberg* rule is also not controlling. Thus, the basis for the alleged invalidity of the "dangerousness" finding is not one which the *Zant v. Stephens* Court implied would require vacation of the death sentence.

When responding to this Court's certified question, the Georgia Supreme Court observed "a different result *might* be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was *not otherwise admissible, and thereafter the circumstance failed.*" 462 U.S. at 890. (Emphasis added). It is to this issue that the Court is called upon to focus. The proposition of the Georgia Supreme Court coupled inadmissible evidence with the failure of the aggravating circumstance. Assuming for the sake of argument that Dr. Pile's testimony was inadmissible, the "dangerousness" aggravating circumstance would not fail even if the testimony relating to the school bus incident is discarded. The jury had before it evidence that Petitioner had previously been convicted of rape in 1973, and he had been paroled less than four months prior to committing this vicious rape and murder. The jury also was aware of Petitioner's confession which contained the statement that he had killed Mrs. Weiler because he

feared being returned to the penitentiary. (J.A. 31, 37, 52, 63). The clear implication was that Petitioner would kill again whenever necessary to avoid being returned to the penitentiary. It requires an unreasonable view of the evidence to conclude that the jury would not have found the "dangerousness" aggravating circumstance but for the presence of the testimony about the earlier attack. This is particularly true in view of the fact that the school bus assault had occurred some fifteen years prior to the murder of Mrs. Weiler when Petitioner was about fifteen years of age. (J.A. 33, 35). Furthermore, the victim of the bus incident had neither been raped nor physically injured. Compared to the overwhelming evidence of Petitioner's recent viciousness and brutality, the bus incident pales into relative insignificance.

The nature of Dr. Pile's testimony should also be taken into consideration. His testimony was not inherently inadmissible. The inadmissibility arises not from the substance of the testimony, but merely from who related the incident. The identical evidence could have been presented by either the victim of the bus incident or by someone else to whom the Petitioner had admitted the incident. Information regarding a defendant's background is a legitimate area of inquiry during capital sentencing, and as such, testimony about the bus incident would not have injected any arbitrary factor into the sentencing procedure.

Of greater importance, the testimony concerning the bus incident did not inject into the sentencing calculus materially inaccurate or misleading information. *See Zant*, 462 U.S. at 887 n. 24. When an aggravating circumstance rests upon materially in-

accurate or misleading information, the accuracy of a death sentence is called into question.[16]

In *Zant*, this Court employed essentially a federal harmless error analysis. *Barclay v. Florida*, 463 U.S. 939, 951 n. 8 (1983). Thus, when a defendant challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 104 S.Ct. 2052, 2069 (1984).[17]

In its opinion the Circuit Court did not specifically refer to harmless error, but the Circuit Court did indicate that it doubted that any prejudice resulted from the admission of the testimony concerning the

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[16]An example of such a situation is found in *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984). Evans had been convicted and sentenced to death. His conviction and sentence had been affirmed by the Virginia Supreme Court and certiorari had been denied by this Court. During state habeas corpus proceedings it became apparent that many of the records of convictions presented to the jury had been seriously misleading or otherwise defective. Accordingly, the Commonwealth confessed error and acknowledged that Evans' death sentence should be vacated.

[17]Petitioner's suggestion that the harmlessness of constitutional error at a capital sentencing should be determined solely by asking whether the evidence might have contributed to the jury's decision, (Br. 34), would present an unworkable standard. Any inadmissible evidence "might . . . [contribute] to the jury's decision." To adopt such a standard of harmless error would require not just a fair trial but one which is perfect.

bus incident.[18] It can be safely assumed that had the Circuit Court been of the opinion that this testimony had tipped the scales in favor of the death sentence it would not have affirmed the sentence.

Even if the Circuit Court did not apply the harmless error test, this Court stands in the position to do so. There exists in the record no disagreement over the facts, and this Court must determine on the basis of "[its] own reading of the record and on what seems to [it] to have been the probable impact...on the minds of the jury," *Harrington v. California*, 395 U.S. 250, 288 (1969), whether Dr. Pile's testimony was sufficiently prejudicial as to require reversal.

This Court's decision in *Zant* was premised in part upon the appellate review provided by the Georgia Supreme Court. This Court said:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.

462 U.S. at 890.

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[18]The Circuit Court's comment came in the context of its discussion of whether trial counsel had been ineffective in not appealing the Fifth Amendment claim. To establish ineffectiveness of counsel a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington, supra.* It follows then that the Circuit Court was of the opinion that the jury's sentencing decision would have not been different even if it were error to have admitted Dr. Pile's testimony.

The Virginia capital sentencing procedure also provides this procedural safeguard. The Supreme Court of Virginia is mandated to review each sentence of death to determine whether such sentence was imposed by any arbitrary factor and whether it was excessive or disproportionate. Section 17-110.1 Code of Virginia. In conducting its review the Supreme Court of Virginia did not consider Dr. Pile's testimony relating the bus incident. (J.A. 74).[19] This is a clear implication that this testimony was considered insignificant. Recognizing that Petitioner's case was the first to be reviewed under the new law, the Supreme Court of Virginia found that the death sentence was

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[19]Petitioner argues that this Court must assume that Petitioner's sentence was based, to a determinative degree, on the finding of dangerousness which was influenced by Dr. Pile's testimony. (Br. 36-37). Petitioner attempts to support this assumption by claiming that trial counsel blundered into eliciting Dr. Pile's diagnosis. (Br. 34). The state habeas court found that trial counsel's examination of Dr. Pile was in an effort to establish that Petitioner was suffering from a mental illness which could be treated. The court concluded that due to the overwhelming aggravating facts the only reasonable defense was to attempt to establish the statutory mitigating factor of extreme mental or emotional disturbance. (Opinion of Judge Carneal dated March 14, 1980 at 7-8). The district court credited these findings and concluded counsel was not ineffective in his examination of Dr. Pile. (Magistrate's Second Preliminary Report dated March 30, 1984, at 20-21). Petitioner raised this issue as Question 3 in his Petition for Writ of Certiorari. In this Court's grant of certiorari the Court limited the grant to Questions 1 and 2. Accordingly, the actions of trial counsel are not properly before this Court. Furt[illegible]r, the fact that the Supreme Court of Virginia did not consider Dr. Pile's testimony in reviewing Petitioner's case demonstrates that this testimony did not influence the finding of dangerousness.

not excessive for cases involving murder in connection with rape. (J.A. 76).

The evidence in aggravation has previously been detailed in Argument III, *supra*, and need not be reviewed further. The evidence of aggravation was overwhelming, and there is no reasonable probability that the testimony concerning the bus incident would have altered the jury's conclusion that a sentence of death was appropriate.

Other courts have been confronted with similar claims that a death sentence should be set aside because inadmissible evidence was admitted during the sentencing hearing. In disposing of these claims the courts have applied a harmless error review. *Skillern v. Estelle*, 720 F.2d 839 (5th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 224 (1983), presents a situation closely analogous to the facts in Petitioner's case. During the sentencing phase of a capital murder trial, the prosecution introduced evidence from a forensic pathologist that there was a probability the defendant would commit acts of violence in the future and constitute a continuing threat to society. The Texas Court of Criminal Appeals found this evidence to have been inadmissible because the doctor was incompetent to testify as an expert and lacked first-hand familiarity with the defendant's personality to testify as a lay witness. However, the Texas Court found the admission of this evidence was harmless because there was ample other evidence of Skillern's violent propensities. The Court of Appeals for the Fifth Circuit concluded that federal habeas relief was not justified because the admission of the prejudicial testimony was not "material in the sense of a crucial, critical, highly significant factor." 720 F.2d at 852.

The defendant in *State v. Campbell*, 664 S.W.2d 281 (Tenn. 1984), was sentenced to death upon conviction of murder during a robbery. The jury found three aggravating circumstances, one being that the defendant had previously been convicted of one or more felonies other than the current charge which involved the use or threat of violence to the person. On appeal, the Tennessee Supreme Court found that the state's introduction of convictions for grand larceny and burglary were inadmissible because they were not related to the use or threat of violence to the person. Nevertheless, that Court found the remaining evidence sufficient to support the aggravating circumstance. The court was convinced beyond a reasonable doubt the admission of this evidence was harmless. Further, the court found the evidence of the other aggravating circumstances overwhelming and in no way depended on proof of the convictions of the nonviolence felonies.

In the final analysis, it is perhaps most significant to note that Petitioner has utterly failed to demonstrate that the allegedly inadmissible testimony of Dr. Pile in any way tainted the other, independent aggravating circumstance—"vileness". The finding of this circumstance alone would justify the jury's sentence. Since Petitioner's death sentence is supported by at least one valid unchallenged aggravating circumstance, the Court of Appeals correctly applied *Zant* in affirming Petitioner's sentence of death.

CONCLUSION

This Court should hold that Petitioner is procedurally barred from having his Fifth Amendment claim considered by federal courts. Petitioner did not raise

this issue pursuant to state procedural rules, and has deprived the state of the opportunity to rule upon his claim. It has now been seven years since Petitioner's trial and appeal. If citizens are ever to expect some semblance of finality in criminal cases, this Court should enforce its holding in *Wainwright v. Sykes.*

This Court should not use this case as a vehicle to consider Petitioner's request for a new rule on pre-trial psychiatric examinations. The implications of any such decision can only be left to speculation as the lower courts did not address the merits of Petitioner's recently created proposal.

The evidence of Dr. Pile did not violate Petitioner's privilege against self incrimination. Even if this testimony is found to have been inadmissible, it was so inconsequential when compared to the unchallenged evidence as to be harmless beyond a reasonable doubt.

The Commonwealth respectfully submits that this Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM G. BROADDUS
Attorney General of Virginia

JAMES E. KULP
Senior Assistant Attorney General

FRANK S. FERGUSON
Assistant Attorney General

Dated: January 3, 1986.

arg.
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No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

EDWARD MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF

*J. LLOYD SNOOK, III
P.O Box 2486
Charlottesville, Virginia 22902
804-293-8185

RICHARD J. BONNIE
University of Virginia School of Law
Charlottesville, Virginia 22901

**Counsel of Record*
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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ARGUMENT

I

THIS COURT SHOULD DECIDE PETITIONER'S CASE ON ITS MERITS.

This Court has granted *certiorari* in this case to decide two important constitutional questions: whether a defendant's right to an adequate mental evaluation to explore evidence relevant to criminal culpability or mitigation of a death sentence can be conditioned on wholesale forfeiture of his Fifth Amendment rights; and whether a constitutional defect in a capital sentencing proceeding should be regarded as harmless simply because it does not taint every aggravating circumstance. If these issues are decided in Petitioner's favor, his death sentence must be set aside. Nonetheless, relying on *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), Respondent urges this Court to ignore Petitioner's claim, and to allow Virginia to execute him, simply because the Virginia courts have ruled that the claim was not raised by Petitioner's counsel on direct appeal.

The Fourth Circuit addressed the merits of Petitioner's claim; this Court should do so as well. The facts pertinent to the procedural default issue are these:

—December 1, 1975—The Virginia Supreme Court decided *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975), *cert. denied*, 425 U.S. 994 (1976). In *Gibson*, the Virginia Supreme Court, while recognizing that "authorities are divided upon the subject," *id.* at 414, held that the prosecution could use the defendant's statements to a psychiatrist during a pretrial forensic evaluation to prove his guilt without abridging the Fifth Amendment.[1]

—May 23, 1977—Michael Smith committed the capital offense for which he has been convicted and sentenced to death.

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[1] Petitioner's trial counsel, David Pugh, testified that he was aware of the holding in *Gibson* v. *Commonwealth*, although he was not aware of the case by name. App. 134.

—July 1, 1977—Virginia's new capital punishment statute, *Va. Code Ann.* §§ 18.2-31 and 19.2-264.2 *et seq.* (1977 Cum. Supp.), became effective.

—November 30, 1977—Petitioner was sentenced to death.

—March 10, 1978—Counsel submitted assignments of error to the Virginia Supreme Court as part of his mandatory appeal. Mr. Pugh did not assign the admission of Dr. Pile's testimony as error because "we did not feel that Virginia case law would support our position at that particular time." App. 142-143. He did not research the federal law, and is not aware that anyone else researched the federal law relating to the issue.

—May 10, 1978—Counsel submitted the Opening Brief in the Virginia Supreme Court. A Brief Amicus Curiae was also submitted in support of Petitioner, by the Post-Conviction Assistance Project of the University of Virginia School of Law. The Amicus Brief addressed the Fifth Amendment implications of psychiatric testimony in capital cases and called the court's attention to the issues raised by the use of Dr. Pile's testimony at trial.

—June 19, 1978—The Fourth Circuit issued its opinion in *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), repudiating *Gibson* v. *Commonwealth*.

—August, 1978—*Smith* v. *Commonwealth* was argued before the Virginia Supreme Court.

—October 6, 1978—*Smith* v. *Commonwealth* was decided. 219 Va. 455, 248 S.E.2d 135 (1978). The Virginia Supreme Court took note of the issues raised by the Amicus Brief, but refused to consider any error not assigned by Smith's counsel, including the error at issue in this case. 219 Va. at 460, 248 S.E.2d at 139 n.1, citing Rule 5:21 of the Rules of the Supreme Court (now Rule 5:25).[2]

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[2] Rule 5:21 then provided:

Error will not be sustained to any ruling below unless the

If counsel had researched the federal law at the time that he filed his assignments of error, it is inconceivable that he would have concluded that the claim was without merit or that he would have failed to raise it. As the Fourth Circuit noted in *Gibson* v. *Zahradnick*, the question presented in *Gibson* had been "substantially answered" by its decision in *United States* v. *Albright*, 388 F.2d 719 (4th Cir. 1968), and "at least 7 other United States Courts of Appeals have since indicated agreement with [the] holding" in *Albright*. 581 F.2d at 78-79. See also the cases cited in Petitioner's Brief 20-21 n.12. In addition, two federal court decisions squarely on point, *Collins* v. *Auger*, 428 F.Supp. 1079 (S.D. Iowa 1977) and *Smith* v. *Estelle*, 445 F.Supp. 647 (N.D.Tex. 1977), had been decided and summarized in the Criminal Law Reporter within the year prior to the filing of the Assignments of Error,[3] and the Fifth and Sixth Amendment implications of pretrial mental evaluations had also been the subject of extensive commentary in the legal literature.[4]

> objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned [in the assignments of error under Rule 5:20] will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of the decision below.

There is no procedure for filing supplemental assignments of error or in some other way bringing up before court an issue raised at trial but not included in the assignments of error.

[3] The District Court decision in *Collins* v. *Auger* had been summarized at 21 Crim.L.Rptr. 2072 (April 20, 1977), and the District Court decision in *Smith* v. *Estelle* had been summarized at 22 Crim.L.Rptr. 2370 (Feb. 1, 1978).

[4] See, e.g., Allis, "Limitations on Prosecution Discovery of the Defense Case in the Federal Courts: The Shield of Confidentiality," 50 *So. Cal. L. Rev.* 461 (1977); Note, "Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards," 51 *N.Y.U.L. Rev.* 409 (1976); Aaronson, "Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Exams," 20 *Stan. L. Rev.* 55 (1973); Lefelt, "Pretrial Mental Exams: Compelled Cooperation and the Fifth Amendment," 10 *Am. Crim. L. Rev.* 431 (1972).

This Court's decision in *Wainwright* v. *Sykes* to apply the "cause" and "prejudice" standard of *Francis* v. *Henderson*, 425 U.S. 536 (1976), to the failure to object to an error at trial does not govern the case in which the error was preserved at trial, but not on appeal.

> Whether the *Francis* rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day.

Sykes, *supra*, 433 U.S. at 88 n.12. This Court's subsequent decisions have focused on the particularly compelling reasons for enforcing a contemporaneous objection rule at trial, *see Engle* v. *Isaac*, 456 U.S. 107, 126-129 (1982), or have involved a failure to comply with North Carolina's unusual requirements concerning the manner in which objections to the instructions must be preserved. *Reed* v. *Ross*, ___ U.S. ___, 82 L.Ed.2d 1, 9-10 n.5 (1984). This court's last clear word on appellate default came in *Kaufman* v. *United States*, 394 U.S. 217 (1969), applying the deliberate bypass standard of *Fay* v. *Noia*, 372 U.S. 391 (1963). The Circuits have split on whether the "cause and prejudice" formula applies to defaults on appeal,[5] and, if it

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[5] The Tenth Circuit has held that in cases of defaults of issues on appeal, the deliberate bypass standard applies. *See Holcomb* v. *Murphy*, 701 F.2d 1307 (10th Cir. 1983); cf. *Rinehart* v. *Brewer*, 561 F.2d 126 (8th Cir. 1977). The Seventh Circuit has adopted the cause and prejudice standard, in part because of its uncertainty about *Kaufman's* continuing vitality. *Spurlark* v. *Wolff*, 683 F.2d 216 (7th Cir. 1982). Other Circuits, without as much elaboration as the Seventh and Tenth, have adopted the cause and prejudice standard for cases involving issues defaulted on appeal. *See e.g.*, *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc*, 754 F.2d 520, *cert. granted sub nom. Sielaff* v. *Carrier*, ___ U.S. ___, 87 L.Ed.2d 649 (1985).

does, whether the "cause" where there has been a default at trial is different from "cause" in a case of appellate default.[6]

This Court need not resolve those questions to decide Petitioner's case. Even if the Court were to assume that the *Sykes* formula applies, it should rule that, under the unique circumstances of this case, the Fourth Circuit correctly decided to reach the merits of Petitioner's claim, notwithstanding the failure of his counsel to raise the claim on direct appeal.

A.

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE FOURTH CIRCUIT CORRECTLY DECIDED TO REACH THE MERITS OF PETITIONER'S CONSTITUTIONAL CLAIM.

This is a proper case for the federal courts to exercise their "equitable discretion" to "look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated." *Reed* v. *Ross*, 82 L.Ed.2d at 10. In this case, the state's attenuated interest in the " integrity of its rules and proceedings and the finality of its judgments," *id.* at 11, must yield to "Congress' expressed interest in providing a federal forum for the vindication of the

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[6] Several post-*Engle* cases have held that "cause" for an attorney's failure to raise an issue on direct appeal may be established even if the attorney's mistake is not attributable to ineffectiveness of counsel of Sixth Amendment proportions. *See Carrier* v. *Hutto*, *supra*; *Clay* v. *Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 433 n.4 (7th Cir. 1984); *Gray* v. *Greer*, 778 F.2d 350 (7th Cir. 1985); cf. *Gibson* v. *Spaulding*, 703 F.2d 362 (9th Cir. 1983). Typically, in these cases the formulation of "cause" permits federal review if the default of an issue resulted from attorney ignorance or inadvertence. In contrast, other cases have expressly held that ineffectiveness sufficient to violate the Sixth Amendment must be shown to establish cause. *See, e.g., Cantone* v. *Superintendent, N.Y. Correctional Facility*, 759 F.2d 207, 218 (2d Cir. 1985).

constitutional rights of state prisoners." *Id.* Five factors support this conclusion.

1. Under The Peculiar Facts Of This Case, Manifest Injustice Would Occur If Petitioner Were to Be Executed Because His Attorneys Failed to Preserve Their Timely Objection To Dr. Pile's Testimony.

Had the same issue arisen in a case in which the Assignments of Error were to be filed 6 months later, after *Gibson* v. *Zahradnick* was decided on June 19, 1978, it is likely that virtually every attorney would have assigned the error and would have briefed it fully to the Virginia Supreme Court. Likewise, had the same claim arisen before *Gibson* v. *Commonwealth* was decided on December 1, 1975, it is likely that many Virginia lawyers would have raised the issue on appeal.

2. Informed Appellate Counsel Would Not Have Abandoned The Issue.

The overwhelming weight of federal case law, available upon even meager research, showed that *Gibson* v. *Commonwealth* was wrongly decided. Publications such as the Criminal Law Reporter had reported such recent decisions, and in fact the Virginia Supreme Court decision in *Gibson* had indicated that the authorities were split.[7]

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[7] We have suggested below that counsel was ineffective in failing to preserve the error, and that such ineffective assistance constitutes "cause" for the federal courts to consider the issue. See 433 U.S. at 96 (Stevens, J., concurring). Although this Court did not grant *certiorari* on our claim that counsel was so ineffective as to be an independent Sixth Amendment grounds of relief, that should not bar the consideration of the competence of counsel in determining whether this issue should be addressed on the merits.

In *Sielaff* v. *Carrier, cert. granted*, ____ U.S. ____, 87 L.Ed.2d 649 (1985), this Court is considering whether the ineffectiveness of counsel sufficient to be a Sixth Amendment violation is conceptually distinct from the ineffective assistance of counsel necessary to be

3. This Issue Was Presented To, And Decided By, Judge Carneal In The State Habeas Proceeding.

In his Findings of Fact and Conclusions of Law, Judge Carneal observed that "Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made during a pretrial psychiatric examination." App. 144-145. After reviewing the facts, Judge Carneal "turn[ed] to the case law discussed by petitioner in support of the first claim" and discussed "two recent decisions dealing with the issue raised," *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), and *Smith* v. *Estelle*, 602 F.2d 694 (5th Cir. 1979). He then stated: "*Focusing on the merits of the first claim*, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal." [Emphasis added.] App. 146-147. He distinguished *Gibson* v. *Zahradnick* because it dealt with a determination of guilt rather than capital sentencing, and distinguished *Smith* v. *Estelle* because it relied on a "waiver" theory. Judge Carneal's conclusion that Petitioner's claim was *without merit* provided an essential link in his reasoning on the issue of ineffective assistance of counsel, and leads to the implication that, had he thought the issue had merit, he would have found that counsel's failure to raise the issue on appeal constituted ineffective assistance. The Virginia Supreme Court affirmed Judge Carneal's ruling, finding no reversible error.

4. This Is A Death Penalty Case.

It is important to remember that this is a death penalty case not only because of the obviously higher stakes involved, and not only because of the overriding concern for reliability in all

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"cause" under *Wainwright* v. *Sykes*. Because we suggest that they are conceptually distinct issues, the failure of this Court to grant *certiorari* on the independent Sixth Amendment claim does not bar us from discussing ineffective assistance as a rebuttal to Respondent's procedural argument.

capital cases,[8] *see Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976), but also because this Court has consistently placed its faith in searching state appellate scrutiny of death cases.

Ever since *Gregg* v. *Georgia*, 428 U.S. 153 (1976), this Court has relied upon the state appellate courts to search thoroughly for errors, and to correct them. See, e.g., *Zant* v. *Stephens*, 462 U.S. 862, 890 (1983):

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.

This Court noted: "the Georgia Supreme Court conducts an independent review of the propriety of the sentence even when the defendant has not specifically raised objections at trial." *Id.* at 879 n.19.[9] While this Court has never held that particular appellate procedure is constitutionally mandated in capital

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[8] Many commentators have taken the position that procedural defaults in state courts should not bar federal review of any claim that would invalidate a death sentence, at least in the absence of a showing that the petitioner himself deliberately bypassed the state process. Catz, "Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception," 18 *U.C. Davis L. Rev.* 1177 (1935); Batey, "Federal Habeas Corpus and the Death Penalty: 'Finality with a Capital F,'" 36 *U. Fla. L. Rev.* 252 (1984).

[9] The Georgia Supreme Court has interpreted OCGA § 17-10-35(c)(1) as requiring consideration of errors that might otherwise be deemed to have been waived for failure to raise at trial. *Hance* v. *State*, ____ Ga. ____, 332 S.E.2d 287 (1985); *Castell* v. *State*, 250 Ga. 776, 778, 301 S.E.2d 234 (1983). The Virginia death penalty statute was modeled on the Georgia statute, and both the Georgia statute and the appellate review conducted under that statute have been repeatedly praised and relied upon by this Court. That appellate review includes the realization that errors not otherwise preserved may nonetheless be circumstances of "passion" and "prejudice" in the imposition of the death sentence.

cases, this Court has clearly indicated its preference for full and careful appellate review of death sentences.[10]

This court need not hold that a state appellate court must make an independent review of claims not raised on appeal or at trial, but surely a state appellate court should consider issues timely raised at trial and presented to it on appeal.

5. The Important Interests That Support Strict Enforcement Of The Contemporaneous Objection Rule Are Not Present In This Case.

In *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982), this Court discussed the social costs of a grant of a writ of habeas corpus, noting that the costs

> are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional

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[10] The Virginia Supreme Court has taken an extremely narrow view of its mandatory appellate jurisdiction in death cases. *Va. Code Ann.* § 17-110.1 (C)(1977 Cum. Supp.) states, in part:

> In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate . . .

In *Fitzgerald* v. *Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), Fitzgerald assigned as error the excessiveness or disproportionality of his sentence, though the issue was neither briefed nor argued (normally grounds for a finding of procedural default). The Virginia Supreme Court held that, the procedural default notwithstanding, they were required to consider and determine the question of disproportionality of the sentence.

However, in *Quintana* v. *Commonwealth*, 224 Va. 127, 148, 295 S.E.2d 643 (1982), the Court rejected the argument that *Va. Code Ann.* § 17-110.1 requires consideration of specific errors not preserved at the sentencing phase of trial. Justice Poff, dissenting in part, argued that the Virginia statute requires the court to consider errors at the sentencing phase, whether or not properly preserved at trial. 224 Va. at 152-153.

> claim in the state courts. In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials . . . The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules.

In this case, the trial court was afforded the opportunity to "correct the defect and avoid problematic retrials," and the Virginia Supreme Court was offered a chance, which it eschewed, to "avoid federal intrusion." Furthermore, in *Engle* v. *Isaac*, the claims had not been taken through state habeas proceedings, as this case was. Here, the Virginia courts were given the opportunity in habeas to correct the defect without federal intrusion, and the denial of habeas relief was appealed to the Virginia Supreme Court, which was again given the chance to "mend its fences," a chance that it again eschewed.

We do not contend that appellate defaults are never to be given weight;[11] certainly if there is any indication that the default was the product of sandbagging[12] or of an informed tactical decision, the federal courts need not grant relief. Nor need this Court hold that all appellate defaults due to ignorance or inadvertence of counsel must be overlooked in order to grant relief to Petitioner. However, this Court must recognize that the state's interests in enforcing its procedural rules "pale beside the need to remedy a constitutional violation," *Engle* v. *Isaac*, 456 U.S. at 129 n.34, in a death penalty case in which the

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[11] Of course, the Virginia Supreme Court has an interest in enforcing its procedural rules, though the interest in enforcement merely for the sake of docket control alone is weak when it is not supported by broader policy considerations such as those which undeniably accompany enforcement of the contemporaneous objection rule.

[12] While "sandbagging" may be a possibility with a trial default, it is virtually inconceivable as an explanation for appellate default. No advantage could have been gained by withholding a good claim from the appeal of right to the Virginia Supreme Court in the hope of improving Smith's chances later in a discretionary appeal.

issue was presented to and decided by the trial court, brought to the attention of the state appellate court through an Amicus brief, and then immediately made the subject of full exposition in a state habeas proceeding. The state's interests in having its Supreme Court decide the question in October, 1978, rather than in the State habeas petition filed seven months later, is negligible.

B.

APPELLATE DEFAULT OF A CONSTITUTIONAL CLAIM RAISED AT TRIAL SHOULD NOT FORECLOSE FEDERAL REVIEW OF THE CLAIM IF THE PETITIONER SHOWS THAT THE DEFAULT WAS DUE TO HIS ATTORNEY'S INADVERTENCE OR FAILURE TO RECOGNIZE THE MERIT OF THE CLAIM.

Petitioner has argued that this Court should reach the merits of his claim, as did the Fourth Circuit, because of the unique facts of this case. This Court can do so without making new law on procedural default. However, if the Court disagrees with this assessment of Petitioner's case, or believes that guidance is needed by the lower courts, it should hold that federal review is permitted if a habeas petitioner shows that the appellate default was due to his attorney's inadvertence or failure to recognize the merit of the claim.[13]

---

[13] The Fourth and Seventh Circuits have held that inadvertence or ignorance constitutes "cause" in cases where the issue was defaulted on direct appeal. *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc*, 754 F.2d 520, *cert. granted sub nom. Sielaff* v. *Carrier*, 105 S.Ct. 3523 (1985); *Gray* v. *Greer*, 778 F.2d 350 (7th Cir. 1985). In addition, the Sixth and Ninth Circuits seem to regard inadvertence or ignorance as "cause" for trial defaults as well as appellate defaults, whether or not counsel's error amounts to a Sixth Amendment violation. *Hockenbury* v. *Sowders*, 718 F.2d 155 (6th Cir. 1983); *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978); *Gibson* v. *Spaulding*, 665 F.2d 863 (9th Cir. 1981); *Garrison* v. *McCarthy*, 653 F.2d 374 (9th Cir.

Under this standard, review would be foreclosed if the defendant or his counsel deliberately tried to evade the state factfinding processes or to delay adjudication of the claim in order to secure a later tactical advantage. Federal review would be presumptively foreclosed if counsel made a tactical judgment that omitting the claim would enhance the likelihood of a successful appeal. In such cases, the client is properly bound by the judgments of his lawyer as long as the attorney provided reasonably competent representation. *See Evitts* v. *Lucey*, ___ U.S. ___, 83 L.Ed.2d 821 (1985); *cf. Washington* v. *Strickland*, ___ U.S. ___, 80 L.Ed.2d 674 (1984).

Federal review should *not* be foreclosed, however, if the petitioner proves that omission of the claim was *not* attributable to informed professional judgment. If the habeas petitioner proves that counsel overlooked the claim or dropped it because he believed, due to inadequate research, that it had no merit, federal review should be permitted, whether or not the attorney's error was so serious as to constitute ineffective assistance of counsel as an independent constitutional violation.

In *Reed* v. *Ross* this Court held that "cause" would be found in the

> failure of counsel to raise a constitutional issue reasonably unknown to him . . . If counsel has no reasonable basis upon which to formulate a constitutional question . . . it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.

1981).

Decisions in the Second and Eighth Circuits have announced or implied that an attorney error in failing to raise an issue does *not* constitute "cause" unless it amounts to a Sixth Amendment violation. *Cantone* v. *Superintendent*, 759 F.2d 207 (2d Cir. 1985); *Tsirizotakis* v. *LeFevre*, 736 F.2d 57 (2d Cir. 1984); *Huckaby* v. *Lockhart*, ___ F.2d ___ (No. 85-1508) (8th Cir. Nov. 26, 1985); *cf. Johnson* v. *Wainwright*, 778 F.2d 623 (11th Cir. 1985).

82 L.Ed.2d at 14. The same reasoning is applicable to cases, such as Petitioner's, in which counsel is *proven* to have been unaware of the existence of a constitutional claim which he fails to raise on appeal. In such cases, the default is attributable to ignorance, not to "strategic motives of any sort." Moreover, to rule that ignorance due to the novelty of an unanticipated claim constitutes "cause" for an appellate default, while ignorance due to counsel's defective (or non-existent) research does not, would be illogical and unfair.

In *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983), this Court emphasized that counsel was necessary on appeal because of the need for "the superior ability of counsel in the examination into the record, research of the law, and marshalling of arguments," *quoting Douglas* v. *California*, 372 U.S. 353, 358 (1963). Appellate counsel is expected to "research . . . the law" to make "reasonable professional judgments" about which issues to raise on appeal. While holding that counsel has no constitutional duty to raise every colorable claim suggested by his client, this Court implied that counsel has provided constitutionally adequate assistance if he has exercised "reasonable professional judgment" in deciding which issues to raise. That professional judgment can be reasonable, however, only if counsel has done his "research of the law" in choosing the issues for appeal.

By permitting federal review of claims forfeited on direct appeal due to attorney error, the Court would not increase the burden of habeas litigation in the federal courts. Even under the strict approach proposed by Petitioner Sielaff and the Solicitor General in *Carrier*, a habeas petitioner would be entitled to federal review if he could demonstrate that the attorney's error was of sufficient magnitude to establish ineffective assistance of counsel. Although the number of federal habeas corpus petitions *granted* may be greater if the burden of proof on "cause" is easier to meet, the number of federal habeas cases *brought* will not likely vary much.

Nor will the nature of the inquiry change. A finding of ineffective assistance of counsel requires a ruling on both the

competence and the prejudice prongs of the test. *Washington* v. *Strickland*, ____ U.S. ____, 80 L.Ed.2d 674 (1984). A habeas court hearing a charge of ineffective assistance of counsel on appeal would look at the competence prong and ask whether reasonably competent counsel would have appealed the issue—in other words, was it a good issue? In the prejudice inquiry the state habeas court asks whether the defendant would have been entitled to a new trial had the issue been appealed—in other words, was it a good issue? In the typical case, a state habeas court will consider the merits of the claim through the ineffective assistance inquiry, within months of a state appellate court's refusal to consider the merits on direct appeal.

Rigid adherence to appellate default rules in federal habeas litigation would have an undesirable effect on the state's appellate process. If it were clear that a claim that was raised at trial but defaulted on direct appeal was foreclosed from federal review—no matter what the explanation—it can be confidently predicted that counsel will appeal every nonfrivolous claim even if it is not fully researched or briefed. The Court noted in *Reed* v. *Ross*, 82 L.Ed.2d at 14-15, that the refusal of the federal habeas courts to consider "novel" claims would "encourage" defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition. This is undesirable because it diffuses the attention of the appellate court. The problem is even greater if the attorney is led to appeal every issue raised at trial simply because he thinks unidentified cases or authorities might support it.

Given the requirement that state remedies be exhausted, and given the fact that state post-conviction proceedings are usually brought very promptly when the defendant has an execution date set, the interests of finality, comity and federalism that are strong factors in trial default cases carry much less weight in appellate default cases.

II.

THE PROSECUTION CANNOT MAKE AFFIRMATIVE USE OF STATEMENTS MADE BY A DEFENDANT DURING A MENTAL EVALUATION CONDUCTED TO HELP DEFENSE COUNSEL EXPLORE EVIDENCE RELEVANT TO CRIMINAL CULPABILITY AND TO MITIGATION OF A DEATH SENTENCE.

A.

Warning A Capital Defendant That Statements Made During A Defense-Requested Mental Evaluation Can Be Used Against Him Would Highlight Rather Than Eliminate The Conflict Between His Right To An Adequate Evaluation And His Fifth Amendment Interests.

Respondent argues, relying on *Estelle* v. *Smith*, 451 U.S. 454 (1981), that a capital defendant's Fifth Amendment rights are adequately protected if the defendant is warned before a mental examination of the use to which his statements may be put. Brief on Behalf of Respondent 13-16. Such a warning may be sufficient to avoid the surprise in *Estelle* v. *Smith*, but it is clearly insufficient in the more usual case, in which the defense is seeking a mental evaluation to explore the availability of claims relevant to criminal culpability and in mitigation of a death sentence. In those cases, warnings would only reduce the likelihood of full disclosure, compromising the reliability of the evaluation. The defendant cannot be required to surrender his privilege against self-incrimination as the price for obtaining an adequate mental evaluation. No legitimate state interest justifies putting the defendant to such an unfair choice.

Suppose, as an example, that a Defendant was only permitted to speak to his attorney in the presence of a police officer. Would such a requirement be rendered any less unconstitutional by giving the defendant a warning that what he might say during the interview could be used against him? Similarly, where a psychiatrist has been appointed to assist the defense, warning the defendant that his statements can be used against

him would merely highlight the defendant's dilemma rather than eliminate it.

B.

The Impermissibility Of Dr. Pile's Testimony Is Reinforced By, But Is Not Dependent On, This Court's Decision In *Ake* v. *Oklahoma*.

Three amicus briefs filed in support of Petitioner's claim in this Court[14] have urged the Court to recognize that confidentiality in a forensic evaluation is necessary to give the defendant a fair opportunity to explore and present claims based on his mental condition and to safeguard the internal strategic precesses of the defense. Accordingly, they have urged this Court to rule that evidence derived from a defense-requested mental evaluation is insulated from disclosure to and use by the prosecution by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.[15] This reason-

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[14] Brief of the American Psychiatric Association and the American Academy of Psychiatry and the Law as Amici Curiae in Support of Petitioner; Brief for Amicus Curiae American Psychological Association in Support of Petitioner; Motion for Leave to File and Brief for the New Jersey Department of the Public Advocate as Amicus Curiae in Support of Petitioner.

[15] This position is also endorsed by the American Bar Association in its Criminal Justice Mental Health Standards approved by the House of Delegates in August, 1984. Standard 7-3.3(b) provides, in relevant part:

> Whenever a mental health or mental retardation professional conducts an evaluation of defendant's mental condition upon the request or motion of the defense, all disclosures made by defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege. As to that evaluation only, the privilege is waived to the extent that discovery is permitted by Standard 7-3.8(b), if:
>
> (i) Defendant gives notice pursuant to Standard 7-6.3 of an intention:
>
> (A) To raise an issue concerning defendant's mental condition at the time of the alleged crime, and
>
> (B) To introduce the testimony of the mental health or

ing is strongly supported by this Court's decision in *Ake* v. *Oklahoma*, ___ U.S. ___, 84 L.Ed.2d 53 (1985), which strongly implies that expert psychiatric assistance must be provided within the framework of the attorney-client relationship. If this is the nature of the assistance guaranteed by *Ake*, it clearly follows that the defendant's disclosures to the expert, and the expert's opinions based on these disclosures, are insulated from discovery by the prosecution (absent a waiver of this protection under state notice and discovery rules) and, even after discovery, are insulated from affirmative prosecutorial use.

However, this Court need not hold that expert assistance must be provided within the framework of the attorney-client relationship in order to rule in Petitioner's favor.[16] If the Court

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mental retardation professional who conducted the evaluation to support the defense claim on this issue; or,

(ii) Defendant calls another mental health or mental retardation professional as an expert witness concerning defendant's mental condition at the time of the alleged crime, and the prosecution establishes, to the court's satisfaction, that in bad faith the defendant secured evaluations by all available qualified mental health or mental retardation professionals in the area thereby depriving the prosecution of the opportunity to obtain an adequate evaluation.

This standard does not preclude a mental health or mental retardation professional from disclosing the fact that the professional evaluated a named person upon defense request.

[16] Under a narrower reading of *Ake*, a "neutral" evaluation, conducted for the court outside the framework of the attorney-client relationship, might satisfy the defendant's constitutional right to an adequate mental evaluation. See 84 L.Ed.2d at 72 (Rehnquist, J., dissenting). If the defendant is not *constitutionally* entitled to an evaluation under the umbrella of the attorney-client relationship, and is entitled only to a "neutral" evaluation by an expert independent of the prosecution, a ban on prosecutorial use of information derived from the evaluation could not be based on the Sixth Amendment right to the effective assistance of counsel. However, affirmative prosecutorial use of disclosures made to a "neutral" expert would still be forbidden by the Fifth Amendment and the Due Process Clause

is reluctant to endorse the propositions urged by Amici, it should not hesitate to rule that the prosecution's affirmative use of Dr. Pile's testimony violated the Fifth Amendment and the Due Process Clause under the reasoning of the Fourth Circuit in *Gibson* v. *Zahradnick* or the parallel reasoning of the Eighth Circuit in *Collins* v. *Auger*, 577 F.2d 1107 (8th Cir. 1978). The inadmissibility of Dr. Pile's testimony on this ground was clearly established in the federal courts at the time of Petitioner's trial.

C.

Petitioner Has Not Changed His Position On The Fifth Amendment Argument.

Respondent argues, at pages 16-17 of its Brief, that Petitioner has shifted his position in this litigation. According to Respondent, Petitioner had previously objected to Dr. Pile's testimony only on the ground that Dr. Pile did not warn him about the consequences of his statements. That is wrong. Since the state habeas petition was filed in 1979, Petitioner has consistently argued that affirmative prosecutorial use of evidence derived from a pretrial mental evaluation must be prohibited to accommodate a defendant's right to an adequate mental evaluation with his privilege against self-incrimination.[17]

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because such a ban is necessary to avoid putting the defendant to an unfair choice between his right to an adequate evaluation and his privilege against self-incrimination.

[17] See, for example the Memorandum of Law filed on November 19, 1979 in the Circuit Court for the City of Williamsburg and the County of James City (pages 5-10) and the Petition for Appeal filed on July 16, 1980 in the Virginia Supreme Court (pages 14-21). Petitioner's substantive theory is clearly reflected in Judge Carneal's Findings of Fact and Conclusions of Law (App. 144-48). Petitioner has consistently argued that a defendant does not "waive" his privilege against self-incrimination by requesting an examination or speaking to the examiner; he "waives" his Fifth Amendment interests only by putting his mental condition in issue and by introducing expert testimony to

D.

The Court Should Not Hesitate To Resolve The Constitutional Issue Presented By Dr. Pile's Testimony In The Present Posture Of The Case.

Respondent has urged the Court to refrain from deciding whether Dr. Pile's testimony was constitutionally admissible on the ground that the issue has not been decided on its merits by the lower courts. This position is a little peculiar in light of the Commonwealth's persistent effort to dissuade every court, including this Court, from deciding Petitioner's claim on its merits. Moreover, the state habeas court actually addressed the merits of Petitioner's claim in the course of ruling that it had been forfeited due to procedural default. Although neither the District Court nor the Court of Appeals squarely confronted the issue, the governing law in the Fourth Circuit is not in doubt; that court's decision in *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978), upon which Petitioner has relied throughout these proceedings, clearly controls this case.[18] Under these circumstances, this Court should not hesitate to resolve the issue upon which it has already granted *certiorari*.[19]

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support his claim.

Of course, Petitioner has argued that even if a waiver of the defendant's Fifth Amendment of interests can be effected by speaking to the examiner, such a waiver occurs only if the examiner gives the defendant explicit warnings at the outset of the evaluation, which Dr. Pile did not do. See Petitioner's Brief 22 n.14. However, this has never been Petitioner's primary argument.

[18] Although the holding in *Gibson* only bars affirmative prosecutorial use of evidence derived from a mental evaluation to prove the defendant's guilt, the Commonwealth has conceded that a capital sentencing proceeding is the "functional equivalent of a guilt trial, at least so far as the Fifth Amendment privilege is concerned." Respondent's Brief at page 22.

[19] Even if the Court is reluctant to decide the issue in the present posture of the case, it should not dismiss the writ as improvidently granted, as suggested by Respondent (Respondent's Brief at page 19, n.14). Instead, the Court should remand the case to the Fourth Circuit with directions to decide Petitioner's claim on its merits.

CONCLUSION

Respondent does not want this Court to reach the merits of the questions on which this Court granted certiorari. In a case such as this one where the substantive issue was raised at trial, not preserved on appeal, but then nonetheless presented to the appellate court by an Amicus Brief, the state's interest in the integrity of its procedural rules does not outweigh Petitioner's interest and the state's interest in not executing someone who has been deprived of a fair trial.

The State cannot condition exercise of the right to an adequate mental evaluation upon a surrender of the Fifth Amendment privilege against self-incrimination. The interviews and work product of an expert appointed at the request of the defense, ostensibly to assist the defense, cannot be subject to affirmative use by the prosecution to prove the statutory predicate for the death sentence.

Michael Smith asks this Court to order that his death sentence be vacated, and that he be resentenced or that his sentence be commuted to life imprisonment, as the state courts may deem appropriate. In the alternative, if this Court shares Respondent's concern that the issues have not been decided on their merits by a lower court, Petitioner asks this Court to remand to the Fourth Circuit with instructions to consider the merits of the issue.

Respectfully submitted,

*J. Lloyd Snook, III
230 Court Square
Charlottesville, Virginia 22901
804-293-8185

Richard J. Bonnie
University of Virginia School of Law
Charlottesville, Virginia 22901

**Counsel of Record*
Counsel for Petitioner

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IN THE
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MICHAEL MARNELL SMITH,
Petitioner,

v.

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOEL I. KLEIN
(Counsel of Record)
JOSEPH N. ONEK
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Approximately 32,000 of the nation's 40,000 psychiatrists are members. The Association has participated as amicus curiae in the three major Supreme Court cases dealing with constitutional aspects of psychiatric testimony in criminal cases, *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), and *Estelle v.*

Smith, 451 U.S. 454 (1981). The Association has also filed amicus briefs in numerous other cases involving mental health issues, including *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), *Mills v. Rogers*, 102 S. Ct. 2442 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The American Academy of Psychiatry and the Law is a medical subspecialty organization of psychiatrists involved in the practice or teaching of forensic psychiatry. Founded in 1969, the Academy has just over 1,000 members in the United States, Canada and other countries. Many of these physicians function regularly as forensic experts in criminal cases, performing examinations of defendants, consulting with defense counsel and prosecuting attorneys, and providing trial testimony on such issues as competency to stand trial, legal sanity, diminished capacity and other legal questions requiring psychiatric expertise. The Academy sponsors numerous educational activities and programs, and is engaged in the development of professional and ethical standards of practice for forensic psychiatrists.

Both the Association and the Academy have been actively involved in examining the role of psychiatrists as expert witnesses and consultants in criminal proceedings, with particular attention to both legal and ethical questions concerning the degree of confidentiality and other protections appropriate to psychiatrists' various roles in that setting. Amici are therefore keenly interested in the issues raised in this case, and believe that they can contribute significantly to the Court's consideration of those issues.

The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk.

STATEMENT

Petitioner Michael Marnell Smith stands convicted of the murder and rape of Audrey Weiler on May 23, 1977. Petitioner was tried before a state court jury in a bifurcated proceeding. No substantial effort was made to contest the state's capital charges at the guilt phase of the trial. At the sentencing phase, the prosecution sought imposition of the death penalty pursuant to Virginia's then-new statutory procedure, Va. Code Ann. § 19.2-264, *et seq.* (Cum. Supp. 1977), requiring proof of specified aggravating circumstances. The jury recommended the death penalty and the trial judge imposed that penalty on November 30, 1977.

Petitioner is an indigent who was represented by appointed counsel. Following petitioner's arrest and arraignment and while awaiting trial, the defense requested and obtained three psychiatric examinations. The first examination pertained only to the question of petitioner's competency to stand trial. The second examination focused on the question of petitioner's legal sanity at the time of the charged offenses. The state psychiatrist designated by the court for this purpose advised petitioner in advance of the evaluation that it would not be confidential, and that petitioner's statements could be used against him at trial. This psychiatrist diagnosed petitioner as having an "inadequate personality," but concluded that he was legally sane.

Still wishing to explore potential psychiatric defenses, petitioner's counsel secured court permission for another examination—the one principally at issue in this case. This third evaluation was conducted by Dr. Wendell Pile, a Williamsburg, Virginia psychiatrist. Without advising petitioner of the nonconfidentiality of the examination, Dr. Pile questioned him for an hour about the circumstances and events surrounding the rape and murder for which he had been charged, and also about prior criminal or violent conduct. Petitioner told Dr. Pile of a

previous incident in which he had attempted the rape of a young girl. Petitioner confessed that, while working as a school bus driver, he tore off a girl's clothing and then, having second thoughts about the matter, decided to let her go. Dr. Pile's report to the court and all counsel, diagnosing petitioner as a "sexually deviant sociopath," included the incriminating information about the prior attempted rape. This information had not been previously known to the prosecution.

Petitioner asserted no psychiatric claim or defense at trial, and called no psychiatrists or other experts as witnesses on his behalf. The prosecution, however, called Dr. Pile as one of its own witnesses at the sentencing phase of the trial. Under Virginia's death penalty statute, one aggravating circumstance sufficient to support a jury recommendation of death is a finding "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2-264.2. Over defense counsel's objection, Dr. Pile was permitted to recount petitioner's inculpatory statements concerning the previously undisclosed rape attempt. The jury returned a finding of "future dangerousness," and also found a second aggravating circumstance prescribed by the Virginia statute.[1]

Petitioner's conviction and death sentence were affirmed by the Supreme Court of Virginia on October 6, 1978. 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). Thereafter, his state petition for a

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[1] Under Virginia law, the jury may recommend a sentence of death either on the basis of a future dangerousness determination *or* if it finds that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *Ibid.* As indicated, the jury found that both of these aggravating circumstances were present in this case.

writ of habeas corpus was rejected, and this Court again denied certiorari. 454 U.S. 1128 (1981). Petitioner then unsuccessfully brought a collateral challenge in federal district court pursuant to 28 U.S.C. § 2254. On appeal, the Fourth Circuit assumed, without deciding, that Dr. Pile's testimony for the prosecution should have been prohibited. Relying on this court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983), however, the Court of Appeals affirmed the denial of the petition in view of the fact that the jury's death penalty recommendation was supported, not only by a finding of future dangerousness, but also by a finding of an independently sufficient alternative aggravating circumstance.

INTRODUCTION AND SUMMARY

This Court granted certiorari to review two questions: the Court of Appeals' application of the principle of *Zant v. Stephens*, *supra*, to the facts of this case; and the permissibility of Dr. Pile's testimony in support of the prosecution's request for the death penalty. Amici will address only the second of these questions. Our position is that the admission of Dr. Pile's testimony to establish petitioner's future dangerousness infringed petitioner's rights under the Due Process Clause and the Fifth Amendment.

I. The principal issue on the merits of this case is the scope of an indigent defendant's Due Process right to psychiatric assistance under *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). The *Ake* decision entitles a criminal defendant to a psychiatrist who functions in two capacities —evaluative and consultative. Proper recognition for the first of these functions is sufficient to resolve the instant case. As the Court explained in *Ake*, a criminal defendant in petitioner's circumstances is entitled to the assistance of a psychiatrist providing evaluative services that are "crucial to the defendant's ability to marshal his

defense." *Id.* at 1095. Depending on the circumstances, the psychiatrist may conduct psychological and physiological tests, as well as an extensive oral examination of the defendant and, on the basis of the information derived from these procedures, assist defense counsel in assessing the feasibility of potential psychiatric claims.

If the right to a psychiatrist functioning in this capacity is to have any meaning at all, it must entail restrictions on the prosecution's access to a psychiatrist consulted by the defense. Defense counsel, in short, must be able to *research* his case in a context of confidentiality. If the price of merely exploring a possible psychiatric defense—a defense that, in fact, may never be advanced at trial—is automatic disclosure to the government of the defendant's statements to the examiner, the right established in *Ake* for the protection of defendants will be perversely transformed into a new and potent discovery tool for the prosecution.

It is one thing to permit an expert retained by the prosecution to examine the defendant once defense counsel elects to assert a psychiatric defense and to support that defense with medical testimony. At that point counsel is able to make the difficult choice that the potential benefit from assertion of the contemplated psychiatric claim or defense is worth the risk of disclosing otherwise confidential information to the government, which it may then use to rebut that claim or defense. But it is another thing altogether to say that the prosecution may have full access to a psychiatrist who has been provided under *Ake*, and may use that psychiatrist to testify on any issue the government pleases, where the defense never even gives notice of an intention to interpose a clinically-supported psychiatric claim or defense. Under the latter approach, the price extracted from a defendant for exercising his *Ake* right is so exorbitant as to eviscerate the right.

Respondent's attempt to avoid this reasoning by analogizing a psychiatrist to a "friend" of the defendant is to no avail. To be sure, a criminal defendant who confides in a friend assumes the risk that the friend may reveal the confidences to the police or prosecution. Consistent with the evaluative psychiatric function envisioned in *Ake*, however, the examining psychiatrist here was not in the legal position of petitioner's friend. He could no more reveal petitioner's incriminating statements to the prosecution than could an attorney working on the defense team.

II. Although not directly presented on the specific facts of this case, a closely-related question arises where a defendant *does* interpose a clinically-supported psychiatric claim or defense, but fails to call as witnesses *all* of the psychiatrists whom he consulted in advance of trial. In these circumstances may the prosecution consult with, and call as witnesses, the psychiatrists who are not called by the defense? This is a recurring problem confronting state and federal trial courts and, indeed, will likely arise in this very litigation in the event of a remand for a new trial on the death penalty issue.

We believe that the question must be answered in the negative in view of the second psychiatric function envisioned in *Ake*. In addition to providing expert evaluative services, the psychiatrist to which an indigent defendant is entitled also performs a *consultative* function as a member of the defense team. This separate function includes the provisior of information—information that a medical expert alone is likely to possess—which defense counsel may need in fashioning his strategy with respect to psychiatric issues, preparing his own experts for cross-examination, and preparing to cross-examine the prosecution's medical experts.

The Due Process right to such consultative assistance is rendered meaningless if, simply because the psychia-

trist is not called as a witness by the defense, he is then free to disclose defense counsel's trial tactics to the prosecution. Nor can this objection be overcome by a rule permitting the prosecution to call the psychiatrist as a witness, but prohibiting advance consultation with the psychiatrist. Obviously, cross-examination strategies based on consultations with a psychiatrist will be completely defeated if the psychiatrist turns out to be the government witness whom defense counsel will have to cross-examine. The government's legitimate interests in these circumstances can be fully protected by allowing it to select its own experts to examine the defendant and consult with the prosecutor.

III. If the Court decides that Dr. Pile's testimony did not infringe petitioner's *Ake* right—and *only* if the Court so holds with respect to the principal Due Process issue in this case—then the same testimony should have been excluded under the Fifth Amendment principles of *Estelle v. Smith*, 451 U.S. 454 (1981). To the extent Dr. Pile did not perform confidential evaluative and consultative services for the defense, his role must be viewed as that of an "agent of the State" within the meaning of *Estelle*. His testimony for the prosecution therefore should have been precluded because it consisted of the recounting to the jury of unwarned statements made by petitioner during a psychiatric evaluation.

ARGUMENT

I. DR. PILE'S TESTIMONY VIOLATED PETITIONER'S DUE PROCESS RIGHT TO THE ASSISTANCE OF A PSYCHIATRIST

The issue presented in this case is the price that may be placed on a defendant's exercise of the Due Process right recognized by this Court last Term in *Ake v. Oklahoma, supra.* The petitioner here never asserted a plea of insanity; never asserted any other psychiatric claim at the guilt or penalty phase of his trial; and never sought to present expert psychiatric testimony on his behalf. Nonetheless, his court-appointed psychiatrist, to whom he had revealed incriminating information in the course of a psychiatric evaluation, was permitted to testify as a prosecution witness and disclose that information to the jury. Under these circumstances, the price extracted from petitioner was so great as to nullify his right to the evaluative services of a psychiatric expert.

This Court's decision in *Ake* established that an indigent defendant, no less than an affluent one, is entitled to the assistance of a psychiatrist in cases where an issue potentially involving psychiatric testimony may be "a significant factor at trial . . ." 105 S. Ct. at 1097. Although such assistance has long been provided under federal law, 18 U.S.C. § 3006A, and by most states,[2] the Court held that a defendant's right to psychiatric assistance is constitutionally-compelled under the Due Process guarantee of "meaningful access to justice," *id.* at 1094, and "an adequate opportunity to present [one's] claims fairly within the adversary system." *Ibid.*, quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). "[W]hen the State has made the defendant's mental condition relevant to his criminal

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[2] *See, e.g.*, Cal. Penal Code Ann. § 987.9 (West Supp. 1984); Colo. Rev. Stat. § 18-1-403 (Supp. 1984); Fla. Rule Crim. Proc. 3.216; Ohio Rev. Code Ann. § 2941.51 (Supp. 1983). *See Ake v. Oklahoma, supra*, 105 S. Ct. at 1094 n.4 (and authorities cited therein).

culpability and to the punishment he might suffer," the Court concluded, *id.* at 1095, the assistance of a psychiatrist represents a "basic tool of an adequate defense" that must be provided—at government expense, if necessary. *Id.* at 1094, quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

While "neither approv[ing] nor disapprov[ing] the widespread reliance on psychiatrists. . . ," *id.* at 1096, and the increasing complexity and importance of psychiatric issues in criminal proceedings, the Court acknowledged the "reality" that access to expert medical assistance "may well be crucial to the defendant's ability to marshal his defense." *Id.* at 1095. The Court stressed that psychiatrists serve an essential evaluative function for the defendant and his counsel. They "gather facts, both through professional examination, interviews, and elsewhere. . . ; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior;" and they furnish defense counsel with "opinions about how the defendant's mental condition might have affected his behavior at the time in question." *Ibid.*

If the right to a psychiatrist fulfilling this evaluative function is to have any substance at all, it must entail restrictions on the prosecution's access to a psychiatrist who has been consulted by the defense. To conduct a medically valid examination and to properly assess the validity of potential psychiatric defenses, a psychiatrist must have the trust of the defendant and his attorney. See *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975); *United States ex. rel. Edney v. Smith*, 425 F. Supp. 1038, 1047-48 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir. 1977). An examination of the defendant on the issue of his legal sanity, for example, inevitably will include probing questions concerning the circumstances surrounding the crimes charged as well as circumstances relating to previous antisocial be-

havior. *See* S. Halleck, *Law In the Practice of Psychiatry: A Handbook for Clinicians* 220 (1980); J. MacDonald, *Psychiatry and the Criminal* 47 (1958). As in the instant case, such questions often will elicit incriminating statements and other inculpatory information. Similarly, where the prosecution seeks to prove a defendant's future dangerousness in a capital case, any attempt by the defense to rebut such allegations would almost certainly involve close questioning of the defendant concerning past criminal behavior.[3]

It is obvious that a defendant will be less than candid with a psychiatrist, thereby defeating the purpose of the state-provided evaluation, if the defendant knows at the outset that, merely by electing to *explore* a potential psychiatric defense—one that he may never actually assert—he makes available to the prosecution the substance of his statements to the psychiatrist, and enables the prosecution to call the psychiatrist as its own witness at trial on any issue the prosecution pleases. In this case, the psychiatrist was used by the state to testify on the question of petitioner's future dangerousness. But the issue presented is not limited to that situation alone. Under respondent's apparent view of this case, a psychiatrist appointed at the request of the defense is in the same legal position as a defendant's "friend," to whom the defendant has confided incriminating information. As such, the psychiatrist presumably also would be allowed to testify for the prosecution at the guilt phase of a trial, revealing confessions or other inculpatory statements tending to prove the defendant's substantive guilt.

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[3] The American Psychiatric Association, one of the amici here, argued in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Barefoot v. Estelle*, 463 U.S. 880 (1983), that psychiatric examinations cannot yield reliable predictions regarding a defendant's future dangerousness.

Respondent takes no account of the importance of confidentiality to the evaluative function performed by a defense psychiatrist under *Ake*. At the preliminary stage of a criminal case, before notice has been given of an intention to interpose a plea of insanity or other psychiatric claim, defense counsel must be able to *research* these matters in a context of confidentiality. Counsel must be able to request a psychiatric evaluation of his client, confident that that limited decision, without more, will not result in automatic disclosure to the prosecution of his client's statements to the psychiatrist. If the rule were otherwise, the right established in *Ake* to psychiatric assistance—a right created for the protection of defendants—would be perversely transformed into a potent new discovery device for the prosecution.

Even before this Court's decision in *Ake*, the principle that there exists *some* limitation on prosecution access to a psychiatrist retained by or appointed for the defendant was almost universally recognized. Applying principles of attorney-client privilege,[4] virtually every federal and state court to consider the question concluded that, while a defendant does not have absolute control over the information given to a psychiatrist consulted at his request, government access to that psychiatrist must be denied in the circumstances presented here. *See, e.g., United States v. Alvarez, supra*, 519 F.2d at 1045-47; *Houston v. State*, 602 P.2d 784 (Alaska 1979); *People v. Lines*, 13 Cal.3d 500, 119 Cal. Rptr. 225, 531 P.2d 793 (1975); *Pratt v. State*, 284 Md. 516, 398 A.2d 421 (1979); *People v. Hilliker*, 29 Mich. App. 543, 547, 185 N.W.2d 831, 833 (1971); *State v. Kociolek*, 23 N.J. 400, 412-15, 129 A.2d 417, 423-25 (1957); *People v. Edney*, 39 N.Y.

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[4] Because psychiatric examinations in this context are not usually undertaken for purposes of treatment, the physician-patient or psychotherapist-patient privilege has generally been held to be inapplicable. *See United States v. Alvarez, supra*, 519 F.2d at 1046; *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983).

2d 620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976); *Pouncy v. State*, 353 S.2d 640 (Fla. 1977); *State v. Bonds*, 98 Wash.2d 1, 653 P.2d 1024 (1982); *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982); *State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979). *But see State v. Carter*, 641 S.W.2d 54, 57 (Mo. 1982) (attorney-client privilege inapplicable to defendant's statements to a psychiatrist retained by defense).

These courts have disagreed regarding the point at which the prosecution may insist on access to such psychiatrists, and the uses to which information secured by these psychiatrists may be put by the prosecution. At minimum, however, virtually every court has agreed that the defendant must give notice of an intention to assert a psychiatric defense before the shield of confidentiality afforded by the attorney-client privilege may be lifted from communications among the defendant, a psychiatrist that he consults, and defense counsel. *See also* C. Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 Emory L.J. 71, 128-30 (1982); American Bar Association, *Criminal Justice Mental Health Standards*, § 7-3.2.[5]

To say that *Ake* requires that the defendant have *some* measure of control over prosecution access to the information disclosed in a psychiatric examination and the expert conclusions based on that examination is not to say

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[5] It has also been repeatedly recognized that statements made by a defendant to a psychiatrist in the context of a court-ordered examination may not be used by the prosecution as evidence to prove the defendant's substantive guilt even when such statements may be used to rebut his psychiatric claims. *See, e.g., Gibson v. Zahradnick*, 581 F.2d 75, 78-79 (4th Cir. 1978); *United States v. Reifsteck*, 535 F.2d 1030, 1034 & n.1 (8th Cir. 1976); *United States v. Bennett*, 460 F.2d 872, 878-80 (D.C. Cir. 1972); *United States v. Alvarez, supra*, 519 F.2d at 1042. *See also* Rule 12.2(c), Federal Rules of Criminal Procedure. Most states have codified this restriction in statutes and procedural rules.

that he can block access in all circumstances: the "fair trial" right established in the *Ake* decision need not deprive the prosecution of evidence it reasonably requires to meet its burden in a criminal case; nor is the prosecution placed at an unfair disadvantage if, to effectuate the right to psychiatric assistance, that assistance is subject to a reasonable degree of confidentiality. A fair "state-individual balance," *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), may be struck without resort to the extreme view apparently advanced here by respondent.

To begin with, any psychiatric expert presented at trial as a defense witness obviously will be subject to cross-examination by the government. Thus, to the extent he is aware of information tending to undermine the defendant's claim, that information generally may be elicited by the prosecutor's questions. More importantly, it is well-settled that once the defense gives notice that it will assert a psychiatric defense and present expert testimony to support it, the prosecution may obtain a court order compelling the defendant to submit to a government examination on that same issue. *See, e.g., Battie v. Estelle*, 655 F.2d 692, 701-02 & n.22 (5th Cir. 1981); *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Karstetter v. Cardwell*, 526 F.2d 1144, 1145 (9th Cir. 1975); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States v. Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); *United States v. Albright*, 388 F.2d 719, 724-725 (5th Cir. 1968); *Pope v. United States*, 372 F.2d 710, 720-21 (8th Cir. 1967) (*en banc*), *vacated and remanded on other grounds*, 392 U.S. 561 (1968). Whether based on a theory of "estoppel," "waiver" of Fifth Amendment rights, or general principles of "fairness" to the prosecution, the government's reciprocal right of access to the defendant in such

circumstances is clear. See *Estelle v. Smith*, *supra*, 451 U.S. at 465-66 (1981).[6]

Moreover, a variety of sanctions are available to assure that the prosecution's access to psychiatric testimony will be no less meaningful than that of a defendant exercising his *Ake* right. Thus, for example, the defendant's noncooperation with a psychiatrist selected by the prosecution could result in the barring of defense use of expert psychiatric evidence, *see, e.g.*, *United States v. Handy*, 454 F.2d 886 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972), Rule 12.2(d), Federal Rules of Criminal Procedure; prosecutorial comment to the jury on defendant's refusal to submit to an evaluation by a physician hired by the government, *see, e.g.*, Alaska Stat. § 12.45.083 (1980), *Lee v. County Court*, 27 N.Y.2d 432, 442-43, 267 N.E.2d 452, 457-58, 318 N.Y.S.2d 705, 713, *cert. denied*, 404 U.S. 823 (1971); or, in the most extreme case, preclusion of the defendant's psychiatric defense altogether, *see, e.g.*, *United States v. Wade*, 489 F.2d 258 (9th Cir. 1973). See generally Meister, *Miranda On the Couch: An Approach to Problems of Self-incrimination, Right to Counsel, and Miranda Warnings in Pretrial Psychiatric Examinations of Criminal Defendants*, 11 Colum. J.L.& Soc. Probs. 403 (1975).[7]

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[6] *Estelle* itself involved an examination by a psychiatrist chosen by the prosecution to determine the defendant's competency to stand trial. While holding that a defendant could refuse to participate in such an examination if the psychiatrist were free to testify as a prosecution witness at the penalty phase of the trial, the Court stated in *dicta* that a different rule would apply "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony . . ." *Id.* at 465. Similarly, the Court indicated that if a defendant wished to use psychiatric evidence on the question of future dangerousness, he could be compelled to submit to an evaluation by a prosecution psychiatrist on that issue as well. *Id.* at 466 n.10.

[7] By describing the various sanctions that have been applied in these circumstances, we do not mean to suggest that all of them

The key point is that the government's opportunity to obtain relevant psychiatric evidence, and the availability of appropriate sanctions to assure that that opportunity will be provided, are limited in two crucial ways: first, access to the defendant for an examination by an expert chosen by the government is predicated on the defendant's decision to assert a clinically-supported psychiatric claim or defense; and second, the use of information obtained in the course of that prosecution examination is restricted to the specific psychiatric issue that the defense has introduced into the case. *See Estelle v. Smith*, *supra*, 451 U.S. at 468-69 (information learned by prosecutor in competency evaluation is not admissible at capital sentencing hearing).[8] Of course, neither of these limitations was observed here.

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represent reasonable responses to a defendant's failure to cooperate with a psychiatric examination conducted for the government. In our view, the most reasonable sanction would be to preclude the defense from introducing expert psychiatric testimony of its own. Barring the assertion of a psychiatric defense altogether would seem to be disproportionate and unfair. The defendant should not be deprived of the opportunity, where feasible, to attempt to establish his defense through lay witnesses testifying concerning their observations of defendant's bizarre or aberrant behavior. *See, e.g., United States v. Pickett*, 470 F.2d 1255 (D.C. Cir. 1972); *Pouncy v. State*, *supra*. Similarly, at least in certain circumstances, permitting prosecutorial comment on the defendant's refusal to be examined may be inconsistent with this Court's admonition that capital sentencing procedures must be unusually reliable. *See Griffin v. California*, 380 U.S. 609 (1965). *See also Estelle v. Smith*, *supra*, 451 U.S. at 468 n.11.

[8] *See generally* cases cited at note 5, *supra*. This second limitation is subject to the possible qualification that, where a defendant elects to take the stand, information he revealed to the government's psychiatrists may also be used to impeach the defendant's testimony. *Compare United States v. Casteneda*, 555 F.2d 605 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977), *with United States v. Leonard*, 609 F.2d 1163, (5th Cir. 1980). We also recognize that, when a case is tried to a single trier-of-fact, it may be difficult, as a practical matter, to limit the effect of certain testimony. For example, a

In sum, the trial court committed constitutional error in this case by allowing a psychiatrist appointed at the request of the defense to testify at the penalty phase as a witness for the prosecution and, in that capacity, to relate incriminating information bearing directly on the jury's decision to recommend the death penalty. By any reasonable measure, the price thus extracted for petitioner's exercise of his right to psychiatric assistance was so exorbitant as to deprive him of that right altogether.

II. THE PSYCHIATRIC FUNCTION ENVISIONED IN *AKE* ALSO PRECLUDES PROSECUTION ACCESS TO THOSE PSYCHIATRISTS WHO ARE CONSULTED BY THE DEFENSE, BUT NOT CALLED AS DEFENSE WITNESSES

The argument just presented is sufficient to demonstrate that petitioner's sentencing hearing was tainted by constitutional error. However narrowly the *Ake* right to psychiatric assistance may be construed, it must at least prohibit prosecution access to a psychiatrist appointed to consult with the defense when the defendant has neither asserted a psychiatric claim nor chosen to introduce expert psychiatric testimony.

More difficult, and potentially more far-reaching, questions regarding the scope of the *Ake* right arise where the defendant *does* interpose a plea of insanity or other psychiatric claim, and gives notice that he will rely on expert medical testimony to support the claim. Especially in capital cases, a defendant in such circumstances,

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prosecution witness, in disputing a defendant's insanity claim, may testify about certain prior antisocial behavior disclosed to him by the defendant during the course of a psychiatric examination. This inform .cion might later influence the jury's decision on the issue of "future dangerousness" in a capital sentencing hearing even though it would not have been independently admissible at that hearing. Of course, none of these ancillary issues are presented here and we believe that their resolution should await the development of a full factual record.

whether indigent or not, will often seek and obtain examinations by more than one psychiatrist in advance of trial. If, for example, a defendant and his counsel consult with two psychiatrists and decide to call only one of these doctors as a witness, is the prosecution then entitled to access to the psychiatrist who will *not* be called by the defense?

Although this precise question is not raised on the narrow facts of this case, it is a recurring problem confronting trial judges in both state and federal courts and, indeed, is likely to arise in this very litigation should petitioner be given a retrial of the sentencing phase of his case.[9] In any event, it is a question that should be taken into account as the Court attempts, in its decision here, to establish the proper limits of confidentiality with respect to psychiatric experts consulted by the defense. For these reasons, amici urge the Court to address this closely related question in this case. As discussed below, we conclude that the question should be answered in the negative—that is, absent highly unusual circumstances,[10] Due Process principles prohibit prosecution access to psychiatrists who have been consulted by the defense but

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[9] Under the Virginia death penalty statute, the jury may consider mitigating evidence consisting of expert testimony that the crimes were "committed while the defendant [was] under the influence of extreme mental or emotional disturbance," or that, at the time the crimes were committed, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired." Va. Code Ann. § 19.2-264.4(B)(ii) & (iv). Thus, petitioner's counsel on remand will likely consult psychiatric experts on these issues, as well as the question of petitioner's future dangerousness. Petitioner requested and obtained three psychiatric examinations in advance of the initial trial in this case. There is every reason to expect that, in the event of a new trial on the prosecution's death penalty request, petitioner will again obtain multiple psychiatric consultations.

[10] *See* note 12, *infra*.

are not called to testify as defense witnesses at trial. Any other rule, we submit, deprives a defendant of his right under *Ake* to a psychiatrist functioning in his constitutionally-mandated *consultative* capacity.

The lower courts have confronted this question mainly in the context of claims of attorney-client (and related work-product) privilege. The majority view is that the privilege precludes prosecution access to those psychiatrists who have been consulted by the defense, but are not called as defense witnesses. *See, e.g., United States v. Alvarez, supra; Houston v. State, supra; People v. Lines, supra; Pratt v. State, supra; People v. Hilliker, supra; State v. Kociolek, supra; Pouncy v. State, supra. Cf. United States ex rel. Edney v. Smith, supra* (rule of confidentiality is preferable as a matter of attorney-client privilege, though not constitutionally-compelled).[11]

Under this approach, the confidentiality of all psychiatric examinations is not waived merely by the assertion of a psychiatric defense and the decision to call one psychiatrist, or some psychiatrists, to testify. Consequently, the government may not use the uncalled psychiatrists as prosecution witnesses; nor may the prosecution obtain the uncalled psychiatrists' written reports, diagnoses, or other opinions regarding the accused. This view has been adopted by the American Bar Association. *See* American Bar Association, *Criminal Justice Mental Health Standards* § 7-3.3(b)(A) & (B).[12]

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[11] *United States ex. rel. Edney v. Smith, supra*, and *Noggle v. Marshall, supra*, are the only reported cases we are aware of to have considered this precise issue from a constitutional standpoint, both of them holding that the majority view of the scope of the attorney-client privilege is not mandated by the Fifth or Sixth Amendments. However, these decisions predate *Ake* and did not analyze the issue under the Due Process principles enunciated and applied in that case.

[12] The only circumstance in which the ABA standards would permit prosecution access is where defense counsel, in bad faith,

The contrary, and minority, view is that the defense decision to advance a psychiatric claim or defense, and to do so with the testimony of at least one psychiatrist, waives the privilege with respect to all other psychiatrists consulted by the defense, thus making them fair game for the prosecution. *See, e.g., State v. Carter, supra; People v. Edney, supra; State v. Bonds*, 98 Wash.2d 1, 653 P.2d 1024 (1982). In recent years this approach has also received the support of several commentators. *See* S. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597 (1980); C. Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation, supra.*

While acknowledging that this narrow view of the attorney-client privilege may have a chilling effect on defense examinations, these authorities argue that the majority approach unduly handicaps the prosecution. Since considerable time may pass between the defendant's initiation of psychiatric consultations and his notification of an intention to assert a psychiatric claim, it is argued, the psychiatrist retained by the prosecution will not have access to the defendant when his recollection of relevant events is freshest. A related contention is that the experience gained by a defendant through consultations with his psychiatrists will impair the validity of the government's examination. Having had the benefit of sev-

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has attempted to deprive the prosecution of any meaningful opportunity to meet its burden on a psychiatric issue through a strategy of consulting virtually all available psychiatric experts in the community. *See* Section 7-3.3(b)(ii). Amici agree that this is an appropriate limitation on the extent of confidentiality to be accorded psychiatric experts who consult with the defense. We also note in this regard that an expert should be unavailable to the prosecution only if he has functioned as a *bona fide* consultant to the defense. Defense counsel should not be permitted to engage an expert for a perfunctory and superficial consultation solely for the purpose of barring the government's use of that psychiatrist as a prosecution witness.

eral "friendly" examinations, it is claimed, a calculating defendant will be circumspect in his responses to questions put to him by the government's expert.

Finally, these authorities argue that there is no justification for denying the prosecution access to a psychiatrist who is consulted but not called by the defense in view of the fact that the defendant cannot avoid an examination with another psychiatrist of the prosecution's choosing. The latter psychiatrist can ask the defendant the same questions posed by the psychiatrists chosen by the defense, and the defendant has no choice but to answer, and to answer fully. See pages 14-15, *supra*. That being the case, according to this argument, there is no point in prohibiting prosecution access to a psychiatric consultant whom the defense will not call at trial.

Although this minority view has a superficial appeal, it does not withstand scrutiny when analyzed under the constitutional principles of this Court's decision in *Ake*.

To begin with, the concern regarding timely access to the defendant by a government-retained psychiatrist may be adequately dealt with by measures short of permitting the prosecution to use the defendant's uncalled experts. For example, the defense could be required to give notice to both the court and the prosecution of its intention to obtain a psychiatric examination. The prosecution would then be entitled to subject the defendant to an examination with a government-retained psychiatrist contemporaneously with the initial defense examination. *See* American Bar Association, *Criminal Justice Mental Health Standards*, § 7-3.4.[13] This procedure also responds

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[13] This procedure would have to be coupled with the requirement that the report of the government-retained psychiatrist be filed initially with the court and not the prosecution. Until such time as the defendant actually gives notice of an intention to assert a psychiatric defense and to call expert witnesses on his behalf, the defendant's Fifth Amendment right remains intact and the government has no claim to the information learned by the doctor or con-

fully to the objection that the government is denied an unrehearsed examination if it must wait until after the defendant has been evaluated several times by psychiatrists who have been retained by the defense.

More fundamentally, prosecution access to psychiatrists who are not used by the defense at trial impermissibly infringes the defendant's *Ake* right to a psychiatrist functioning in a *consultative* capacity. *Ake* makes clear that, in addition to the evaluative services discussed in the first section of our brief, the psychiatric assistance to which an indigent defendant is entitled includes expert advice to aid in the "preparation and presentation" of psychiatric defenses, 105 S. Ct. at 1097, and to provide medical information necessary for "preparing the cross-examination of the State's psychiatric witnesses." *Id.* at 1096. Prosecutorial access to psychiatrists who have been consulted by the defense for this purpose creates the grave risk of disclosure to the government of defense counsel's legal strategies and theories—information to which the government has no legitimate claim.

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tained in his written report. Premature disclosure of the report also creates the risk of revealing to the prosecution evidence relevant to the guilt phase of the trial (for example, where the defendant is also asserting a plea of self-defense) or investigative leads. And because the Fifth Amendment prohibits government use of *this* type of information even after the defendant has entered a plea of insanity or other psychiatric defense, *see, e.g., Gibson v. Zahradnick, supra*, 581 F.2d at 78-79; *United States v. Reifsteck, supra*, 435 F.2d at 1034 n.1 (8th Cir. 1976); *United States v. Alvarez, supra*, 510 F.2d at 1052; *Collins v. Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977), the report should be carefully reviewed by the trial judge before it is made available to the prosecution. This is the view endorsed by the American Bar Association. *See* ABA, *Criminal Justice Mental Health Standards* § 7-3.8(a). Alternatively, the court could bifurcate the trial of the case, making the report available to the prosecution after the jury has found that the defendant committed the actus reus, but before the jury has been presented with evidence on insanity or other psychiatric defenses.

Assume, for example, that defense counsel in a capital case, invoking his client's *Ake* right, consults a psychiatric expert for assistance in developing an effective cross-examination of the prosecution's medical witnesses on the question of the defendant's future dangerousness. *See Barefoot v. Estelle*, 463 U.S. 880, 899 n.5 (1983); *Ake*, *supra*, 105 S. Ct. at 1097. It is inconceivable that, simply because the psychiatrist performing this consultative function is not called as a defense witness at trial, he may be consulted by the prosecution and may reveal the line of questioning that defense counsel intends to use in cross-examination.

Nor can this problem be cured with a rule permitting the prosecution to call the psychiatrist as its own witness, but forbidding the prosecution from consulting with him in advance of trial. The psychiatrist, having educated defense counsel on medical and scientific principles relevant to his client's psychiatric claim, and having discussed those same principles in a context designed to assist counsel in preparing an effective cross-examination, cannot be permitted to defeat that strategy by appearing as the prosecution witness whom defense counsel will have to cross-examine.

There are also other instances where a psychiatrist, performing the consultative function envisioned in *Ake*, will be made privy to information that is well within the ambit of protected attorney work product and therefore should remain confidential. In the course of a consultation, for example, defense counsel may raise what he perceives to be shortcomings or vulnerabilities in the psychiatric claim that he plans to present, and may ask the consultant for his opinion on these matters. Or the consultant may suggest that a particular test or inquiry be made—only to be advised by the attorney that there are good reasons not to go down the path proposed.

In short, *Ake* entitles a defendant in a criminal case to the assistance of a psychiatrist fulfilling a particular

role—a consultative role—that necessarily requires the expert to function as a member of the defense team. In that capacity the psychiatrist should no more be permitted to consult with the prosecution, and to reveal defense counsel's strategies and theories, than one of the attorneys representing the defendant. *Cf. United States v. Morrison*, 449 U.S. 361 (1981); *Hoffa v. United States*, 387 U.S. 231, 233 (1966); *Black v. United States*, 385 U.S. 26 (1966) (Sixth Amendment violated where government intrusion into attorney-client communications prejudices defendant through prosecutorial use of information so derived).[14]

Prosecution access to psychiatrists consulted by the defense also interferes with defense counsel's litigation strategy in another way. Although it is possible for the same psychiatrist to serve as a consultant to the defense and to testify as a defense expert at trial, there may be good reasons for defense counsel to rely on different psychiatrists to perform these different functions.[15] Indeed,

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[14] For the same reasons, the prosecution should be permitted little, if any, pretrial access to a psychiatric expert the defense does intend to call as a trial witness. At most, we believe that the prosecution should be permitted to see the psychiatrist's written report, setting forth his findings and opinion.

[15] The adversarial aspect of the consultant's role has no place on the witness stand. As one leading forensic psychiatrist has put it:

> "When he takes the witness stand the psychiatrist becomes a person committed to the process of truth seeking no matter how the truth may conflict with his own ideologies. At this point the psychiatrist should not be reluctant to reveal information that may be adverse to his client's interest. He should never make any effort to embellish his testimony in a manner which leads to even minor distortions of information."

S. Halleck, *Law In The Practice of Psychiatry*, *supra* at 199. Dr. Halleck notes that, properly trained, a psychiatrist can perform both functions in a single case. He also cautions, however, that a psychiatrist sometimes "forgets he is no longer an adversary when he takes the witness stand [and thereby] risks becoming an inferior witness who can easily be embarrassed or humiliated in the course of testimony." *Ibid.*

prudent defense counsel, having the opportunity to consult with more than one psychiatrist, may well seek out an expert who is likely to *dispute* the merits of counsel's contemplated psychiatric claim. A psychiatrist who is doubtful about a particular psychiatric claim may be able to provide more meaningful assistance than a psychiatrist who is supportive of the claim. The defendant's attorney, in other words, should not be forced to seek out the assistance of only those psychiatrists who are thought likely to render an opinion favorable to the accused. Yet, this almost certainly will be the choice of a cautious defense attorney if he knows that any psychiatrist rendering a less-than-favorable opinion is likely to end up testifying against his client at trial.[16]

For these reasons, the Due Process right to psychiatric assistance in criminal cases precludes government access to psychiatrists who have been consulted by the defense and who, for whatever reason, are not called to testify as defense witnesses at trial.[17]

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[16] Prejudice to the defendant in this context is particularly great where the prosecutor, in his summation or direct examination of a psychiatrist not called by the defense, informs the jury that the witness was initially selected by the defendant. *See, e.g., Pratt v. State, supra,* 398 A.2d at 425 & n.4.

[17] Should the Court reject this argument, amici submit that, at a minimum, indigent defendants should be treated the same as nonindigent defendants with respect to attorney-client privilege rules protecting the confidentiality of consultations between a criminal defendant and the psychiatrists he consults. Thus, those jurisdictions extending the attorney-client privilege to psychiatrists who are consulted by the defense, but not called as witnesses by the defense, must afford the same safeguard to indigent defendants who obtain multiple examinations at state expense. Given the importance of this protection, its availability should not be allowed to turn on a defendant's ability to pay for psychiatric assistance.

III. IF THE PROSECUTION'S USE OF DR. PILE'S TESTIMONY IN THIS CASE IS FOUND NOT TO VIOLATE PETITIONER'S DUE PROCESS RIGHTS, THAT TESTIMONY SHOULD THEN BE FOUND TO VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

We have thus far argued that the admission of Dr. Pile's testimony at the sentencing phase of petitioner's trial breached petitioner's Due Process right under *Ake* to a psychiatric expert fulfilling his constitutional role as defense evaluator and consultant. Should the Court reject this argument, however, it then follows that Dr. Pile's testimony should have been excluded because, on the facts presented, it infringed petitioner's Fifth Amendment rights under the principle of *Estelle v. Smith*, *supra*.

Estelle involved a court-ordered psychiatric examination on the question of the defendant's competency to stand trial in a capital case. Despite the ostensibly limited purpose of the examination, the psychiatrist later testified as a prosecution witness at the penalty phase of the trial and, relying on information elicited during the competency evaluation, testified in support of the government's claim that the defendant posed a "future danger"—there, as here, an aggravating circumstance supporting imposition of the death penalty.

The Court ruled, *inter alia*, that, while the defendant could not have remained silent in a competency evaluation properly restricted to that issue, once the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of . . . future dangerousness, his role changed and became essentially like that of *an agent of the State*, recounting unwarned statements made in a postarrest custodial setting." 451 U.S. at 467 (emphasis added). Because the defendant's Fifth Amendment right against self-incrimination was

thus fully implicated, the psychiatrist's failure to give *Miranda*-type warnings in advance of the examination precluded the psychiatric testimony at the sentencing phase of the trial.

In our view, the Due Process right recognized in *Ake* entitles a criminal defendant to the assistance of a psychiatrist who, unlike Dr. Pile in the instant case, performs evaluative and consultative functions in a context of confidentiality. Because a psychiatric examination in those circumstances is consensual, our Due Process arguments are concededly inconsistent with the view that the psychiatric examination was subject to Fifth Amendment safeguards. Should the Court reject those Due Process arguments, however, we submit that, for all practical purposes, Dr. Pile must be viewed as having functioned as "an agent of the State" within the meaning of *Estelle*. As such, his testimony at the sentencing phase should have been prohibited because it was based entirely on petitioner's unwarned statements. *See Battie v. Estelle*, *supra*, 655 F.2d at 699-703 (5th Cir. 1981).

If the prosecution may have access to a psychiatrist consulted by the defense even when the defendant has never asserted a psychiatric claim, and may use the psychiatrist to testify on any issue at all, it follows that no right of confidentiality whatever attaches to the psychiatric consultation provided pursuant to *Ake*. Under this approach a defendant's decision to speak to a psychiatrist selected by the defense is no different from a decision to speak to a psychiatrist selected by the prosecution—indeed, for Fifth Amendment purposes it is the same decision since the psychiatrist selected by the defense ends up testifying for the prosecution. That decision, no less than the decision to speak with the psychiatrist in *Estelle*, may not be presumed voluntary in the absence "of procedural safeguards effective to secure the

privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).[18]

To be sure, petitioner here was not under direct compulsion to submit to an examination by Dr. Pile; the psychiatric evaluation was initiated by his attorney and not by the court, as in *Estelle*. However, petitioner was subject to the considerable compulsion confronted by any defendant whose only real chance of defending against a criminal charge is the assertion of a psychiatric defense. This is at least as great as the compulsion that obtains in a postarrest police interrogation, where warnings are, of course, mandatory.

Petitioner's Fifth Amendment right against self-incrimination was thus violated in this case *if* the Court determines that his Due Process right to psychiatric assistance was not. To the extent Dr. Pile was free to recount petitioner's inculpatory statements to the jury, petitioner should have been alerted, in advance, to that potential consequence of the examination.

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[18] Although petitioner's counsel apparently advised him not to discuss prior violent or criminal activity with Dr. Pile, we do not think this general admonition was sufficient to remedy Dr. Pile's failure to give appropriate warnings at the outset of the examination. In *Estelle* the Court's Fifth Amendment and Sixth Amendment holdings were independent of each other. Thus, even if the defendant in that case had had the assistance of counsel in advance of the competency evaluation, the psychiatrist's failure to give warnings to the defendant would still have precluded the psychiatrist's later testimony for the prosecution on the issue of future dangerousness. The same is true here. We believe that an appropriate warning about the lack of confidentiality should be given *by the psychiatrist* at the time of the examination. We note in this regard that the ethics of the psychiatric profession require such disclosures by examining psychiatrists. *See* American Psychiatric Association, *Principles of Medical Ethics With Annotations Especially Applicable To Psychiatry, Section* 3, Annotation 6 (1985).

CONCLUSION

For the foreging reasons, the Court should rule that the admission of Dr. Pile's testimony in the circumstances of this case was constitutional error.

Respectfully submitted,

JOEL I. KLEIN
(Counsel of Record)
JOSEPH N. ONEK
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amici Curiae

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NO. 85-5487

In The
Supreme Court of the United States
October Term, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

ALLYN R. SIELAFF, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LINDA G. ROSENZWEIG *
Director
Division of Mental
Health Advocacy
Department of the
Public Advocate

ALFRED A. SLOCUM,
ACTING PUBLIC ADVOCATE
Department of the
Public Advocate
CN-850
Trenton, New Jersey 08625
(609) 292-1780

* Counsel of Record

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 (215) 928-1900

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-5487

MICHAEL MARNELL SMITH,

Petitioner

v.

ALLYN R. SIELAFF, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE
A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate[1] (Department) respectfully moves this Court for leave to file

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[1]The Department is specifically empowered to "represent the public interest in such administrative and court proceedings...as the Public Advocate

(continued on next page)

the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained; the attorney for the respondent has stated that he opposes the Department's request.

The Department is a cabinet level agency of New Jersey state government.

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[1](continued from previous page) deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30.

Within the Department, the Division of Mental Health Advocacy (Division) was established to represent "indigent mental hospital admittees" in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25.

The Office of the Public Defender (office) is administratively housed in the Department and provides criminal defense services to all indigent persons in the State charged with indictable offenses. See, N.J.S.A. 2A:158A-1 et seq.

N.J.S.A. 52:27E-2. It has litigated extensively in major areas affecting "the public interest" for over ten years.

The Department has participated before this Court both as counsel and as amicus curiae in a number of cases related to the issues before the Court here. See, e.g., Ake v. Oklahoma, 470 U.S.--, 105 S.Ct. 1007 (1985); Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043 (1983); Kremens v. Bartley, 431 U.S. 119 (1977); Strickland v. Washington, --U.S.--, 104 S.Ct. 2052 reh. den. 104 S.Ct. 3562 (1984).

The interest of the Department in this case arises from its long-term representation of persons charged with crime whose mental state is at issue,[2] of persons charged with

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[2] See, e.g., State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978) (right of insanity acquittees to periodic review of commitments); State v. Kahn, 175 N.J. Super. 72, 417 A. 2d 585 (App. Div. 1980) (right to contemporaneous competency

(continued on next page)

crime facing the death penalty,[3] of institutionalized persons who wish to seek or refuse various forms of psychiatric treatment and of persons facing involuntary civil commitment.[4] Often, protection of the rights of these clients involves use of psychiatric experts, both to evaluate possible claims and defenses and to assist

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[2](continued from previous page) determination prior to imposition of insanity defense over defendant's objections); In re A.L.U., 192 N.J. Super. 480, 471 A. 2d 63 (App. Div. 1984) (further articulation of periodic review rights of insanity acquittees).

[3]N.J.S.A. 2C:11-3.

[4]See, e.g., In re Geraghty, 68 N.J. 209, 343 A. 2d 737 (1975) (promulgation of court rule mandating appointment of counsel at commitment hearings; In re S.L., 94 N.J. 128 (1983) (establishing the rights of persons no longer dangerous to themselves or others).

counsel in trial preparation. Because an accurate assessment in these areas demands frank and candid discussions between the psychiatrist and the defendant, the full and effective assistance of counsel would be hindered if the candid discussion effectively waived his Fifth Amendment rights, or if counsel's ability to explore all possible defenses is chilled by the possibility of having to turn an adverse report over to the prosecution. The Fifth Amendment, the Sixth Amendment, the attorney-client privilege, and the work-product doctrine are all elicited by the communications among defense psychiatrist, defense attorney, and their client. Amicus will argue that New Jersey has for nearly thirty years barred the State from calling as a witness a defense-retained expert whom the defense will not call to testify, with no adverse effect. Amicus will further argue that in the

opinion of the State's highest court, such a rule actually promotes the administration of justice.

To the best of our knowledge, no other amicus or party in this case will deal with these matters from the same perspective as this Department has.

For the above reasons, the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

ALFRED A. SLOCUM
ACTING PUBLIC ADVOCATE

By _____
Linda G. Rosenzweig
Director
Division of Mental Health
Advocacy

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO. 85-5487

MICHAEL MARNELL SMITH,

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ALLYN R. SIELAFF, DIRECTOR
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ON WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT

INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate, and two of its component parts, the Division of Mental Health Advocacy [hereinafter the Division] and the Office of the Public Defender, submit this brief in support of Michael Marnell Smith, and urge this Court to reverse the judgment of the Fourth Circuit and set aside the sentence of death. The

Division, a statutory portion of the cabinet level Department[1] is mandated to provide representation to "indigent mental hospital admittees"[2] in matters pertaining to their "admission to, retention in, or discharge from" mental hospitals in the State. N.J.S.A. 52:27E-24. In fulfillment of this obligation, the Division provides legal representation to residents of nine of New Jersey's counties on 7,700 matters per year.[3] As such, the Division has a substantial interest in this Court's consideration of any matter in which a civilly-committed patient, or a mentally

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[1] N.J.S.A. 52:27E-2.

[2] N.J.S.A. 52:27E-23.

[3] This figure includes not only initial commitment hearings, but also periodic reviews of civil commitments, commitments of persons found not guilty by reason of insanity or incompetent to stand trial and other issues affecting persons with involvement in the mental health system.

ill defendant, would be deterred from seeking the assistance of an expert psychiatric witness for use at trial because he knows that an unfavorable report would be available to the State.

The Office of the Public Defender, established in 1967, represents all indigents charged with indictable offenses in New Jersey. In 1984, the Public Defender represented indigents in 45,131 indictable cases. Of those, forty-four were new capital punishment cases. Since the restoration of the death penalty in New Jersey, the Public Defender has represented a total of eighty-nine defendants in capital cases. The Public Defender plainly has an interest in any matter pending before this Court which would infringe upon the latitude presently afforded defense counsel in New Jersey to explore defenses such as the insanity defense without fear of the State's discovery or use of any unfavorable reports. The Public

Defender therefore is vitally interested in any decision which would interfere with the right of a criminal defendant to effective assistance of counsel.

SUMMARY OF ARGUMENT

In criminal trials at which the question of defendant's mental capacity at the time of commission of the alleged offense is raised in defense, the assistance of a psychiatric expert is essential to evaluate the viability of the insanity defense, to testify at trial if the defense is found to be viable, to assist counsel in preparing for cross-examination of the State's experts and to evaluate possible mitigating factors in the sentencing phase.

Since psychiatry is not an exact science, and many subjective elements enter into the final conclusions of a psychiatric expert, it is virtually impossible for defense counsel to predict with any certainty whether or not the report will be favorable to his client.

In order to provide effective representation, an attorney must be afforded the latitude and the freedom to fully explore and develop a meritorious defense on his

client's behalf without risking a crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial. In New Jersey, the Supreme Court has ruled that such protection is guaranteed by the Sixth Amendment right of the accused to effective assistance of counsel. In New Jersey, the Supreme Court decision -- protecting from discovery by the State reports which the defense does not intend to use at trial -- has existed without modification since 1957. The Court has on two occasions since that time affirmed and reiterated that constitutional protection. Indeed, the New Jersey Supreme Court has indicated that such a procedure considerably advances the interests of justice and in no way hampers the State's ability to prosecute.

In the within brief, this Court is urged, on Sixth Amendment right to counsel grounds, to reverse the judgment of the Fourth Circuit and set aside the sentence of death.

ARGUMENT

I. SINCE EXPERT PSYCHIATRIC ASSISTANCE PLAYS A PIVOTAL ROLE IN CRIMINAL PROCEEDINGS, THE MAXIMUM OPPORTUNITY FOR CONSULTATION AND INTERACTION WITH THE EXPERT MUST BE AFFORDED COUNSEL AS PART OF THE INTERNAL STRATEGIC PROCESS OF THE DEFENSE

This Court has unequivocally recognized that psychiatric experts play a "pivotal role" in criminal proceedings, in marshalling an effective defense to the charges, in assisting counsel to rebut the State's evidence in the sentencing phase and assisting the defense to obtain a fair trial. In Ake v. Oklahoma, 470 U.S. -- , 105 S.Ct. 1087 (1985), the majority clearly determined that "a defense may be devastated by the absence of a psychiatric examination and testimony." 470 U.S. at -- , 105 S.Ct. at 1097.

Plainly, a psychiatric expert makes a profoundly significant contribution to the internal strategic processes of the defense. Besides the interview of the defendant, the interaction between such an expert and defense counsel may involve the professional

evaluation of complex and highly sensitive material. The defense attorney often must reveal critical defense strategies to his evaluating psychiatrist to assist the psychiatrist in preparing his evaluation, as well as including the defense psychiatrist in trial preparations and formation of new strategies based on the evaluation.

Like Ake, Michael Marnell Smith is faced with the death penalty. For both, future dangerousness was a significant issue to be resolved in the capital sentencing phase. Plainly, the essential functions of a psychiatric expert delineated in Ake apply with equal force in the case at bar.

The first function of a psychiatric expert, noted in Ake, is to "help determine if the insanity defense is viable." Ake v. Oklahoma, 470 U.S., supra, at -- , 105 S.Ct., supra, at 1096. Indeed it was for that very reason that Smith's counsel moved the trial court to have expert

assistance provided. The Ake majority described this vital function:

> In this role, psychiatrists gather facts, both through professional examination, interviews and elsewhere;...they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. 470 U.S. at -- , 105 S.Ct. at 1095.

It is at this juncture that confidentiality of the psychiatrist's conclusions is urgently needed, for counsel's ability to test the viability of such a defense will be markedly impaired if the outcome of an unfavorable report will be available to the State.

Further, psychiatry is not an exact science:

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis,

> in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Addington v. Texas, 441 U.S. 418, 430 (1979).

It is virtually impossible for the attorney to predict with any certainty whether the expert's report would be favorable or not. If counsel is forced to predict that outcome at the earliest stages of a case -- and if he knows that an unfavorable report would be usable by the State -- an attorney is put to an unconscionable choice: he must either forego what might be an exculpatory report, or risk incriminating his client.

If counsel, in consultation with the psychiatric expert does determine that the insanity defense is viable, the psychiatrist assumes a second and "crucial" function, 470 U.S. at -- , 105 S.Ct. at 1096, of "presenting testimony"

to the jury and "assisting in preparing the cross-examination of the State's psychiatric witnesses." 470 U.S. at -- , 105 S.Ct. at 1096:

> They know the probative questions to ask of the opposing party's psychiatrist and how to interpret their answers. Unlike lay witnesses who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the elusive and often deceptive symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950) and...assist lay jurors...to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. 470 U.S. at , 105 S.Ct. at 1095-1096.

When legal insanity is likely "to be a significant factor in defense, the need for a psychiatrist is readily apparent." It is in such a case that "a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." 470 U.S. at -- , 105 S.Ct. at 1097. The questions

asked by defense counsel of Dr. Pile and Dr. Dimitris at the sentencing hearing demonstrate this "devastating effect" foreseen by this court when psychiatric assistance in preparing psychiatric cross-examination is not available. Without psychiatric assistance, defense counsel inadvertently produced unrefuted testimony detrimental to Smith.

The third and final function of a psychiatrist identified by this Court in Ake is marshalling and establishing the relevant evidence during the sentencing phase:

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case.[4]

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[4]The Court's holding in Ake that a defendant is entitled to the assistance of a psychiatric expert where sanity is a significant factor at trial is not limited to capital cases and applies whenever the defendant's life or liberty is at risk. See concurring opinion of Chief Justice Burger, stating that such protections should only be available in capital cases, and disagreeing

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> The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed.... Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the juror's minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires...assistance in preparation at the sentencing phase. 470 U.S. at , 105 S.Ct. at 1097.

In fact, the widespread reliance on psychiatrists discussed by this Court in Ake leads to the inescapable conclusion that in cases where mental illness is a significant factor at trial, a defendant runs an unacceptably high risk of an inaccurate resolution of the issues if he is forced

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[4](continued from previous page) with the majority opinion insofar as it afforded such a right in non-capital cases as well. 470 U.S. at -- , 105 S.Ct. at 1099.

to forego the use of a psychiatrist. 470 U.S. at -- , 105 S.Ct. at 1096. In finding that the denial of expert psychiatric assistance to Ake, because of his indigency, had deprived him of due process of law, this Court gave explicit recognition to these three essential functions of a psychiatric expert. As the discussion in Point III, infra, makes plain, the decision of this Court in the case at bar will determine whether a defendant's access to a psychiatrist in his defense will be illusory or real. If defense counsel is to have the capacity to test the viability of an insanity defense, or explore the existence of mental illness in states where it is a mitigating factor in sentencing, or attempt to rebut "dangerousness" as an aggravating factor, he must be free to conduct such a wide-ranging psychiatric evaluation without fear that the outcome will be adverse, and the results available to the State. As this Court

observed in Estelle v. Smith, 451 U.S. 454, 471 (1981), the "decision to be made regarding the proposed psychiatric evaluation...is difficult even for an attorney because it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." Weighed against the massive adverse effect of denial of psychiatric assistance in criminal procedures, the government interest is minimal.[5] In light of the essential nature of psychiatric assistance in an adversarial system, especially in capital

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[5]It is important to remember that the prosecution can obtain its own psychiatric expert. Even if it chooses not to do so, the State has the right to use hypothetical questions presented to psychiatrists, who have not evaluated the defendant, to demonstrate dangerousness in the penalty phase. Barefoot v. Estelle, 463 U.S. 880, 903 (1983).

cases, maximum latitude must be afforded the defense to develop evidence and present defenses.

II. ACCURATE PSYCHIATRIC EXPERT OPINION CANNOT BE PROVIDED UNLESS THE DEFENDANT IS FREE TO FULLY AND OPENLY DISCLOSE HIS HISTORY AND HIS THOUGHTS

The main hallmark of a reliable, accurate and trustworthy expert psychiatric opinion is its foundation in an open and honest exchange with the defendant. If the defendant is reluctant to divulge the details of past mental illness and psychiatric treatment, and present fears, hallucinations and paranoia, it is abundantly clear that a complete history and an accurate diagnosis will be impossible. With an incomplete history or a diagnosis that is missing key indicators of major mental illness, evidence which might have established a viable insanity defense is irretrievably lost. When that occurs, the risk of an erroneous determination of guilt rises markedly.

It is undisputed that psychiatrists rely on full and open disclosure in order to

provide reliable expert opinion.[6] Commenting on the need for a detailed history, which includes past episodes of violence, Leigh Roberts, M.D., stresses the need for a probing examination. It is beyond dispute that incriminating material is often elicited:

> The evaluation in most cases should include a complete psychiatric

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[6] See Brief for American Psychiatric Association as amicus curiae, Estelle v. Smith , 451 U.S. 454 (1981). See also Group for the Advancement of Psychiatry, Rep. No. 45, at 92 (1960):

> The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. (Emphasis added).

> evaluation with a full past and present history of the client. It should also include a mental status examination. This includes assessment of intelligence, competence of organic brain functioning, symptoms of mental disorder, patterns of coping with stressful situations, and levels of anxiety and depression.... With alleged sex offenders, the detailed history, relationship of sexual problems to the alleged offense, and assessment of danger to past victims are all important....[7]

Roberts asserts that a complete examination may require several days or even weeks in highly complex cases if adequate data is to be elicited.[8] More recent commentators have echoed and reinforced Roberts' emphasis on the need for a comprehensive, probing examination accompanied by

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[7] Roberts, "Some Observations on the Problems of the Forensic Psychiatrist," in Allen, Ferster and Rubin (eds.), Readings in Law and Psychiatry 136, 140 (1968).

[8] Ibid.

a thorough history.[9]

Nonetheless, psychiatrists recognize that most defendants are extremely reluctant to divulge confidential material,[10]

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[9]Harold I. Kaplan, M.D., Benjamin J. Sadock, M.D., eds., Comprehensive Textbook of Psychiatry, Fourth edition, Vol. 2 (Baltimore: Williams and Wilkins, 1985).

[10]The disinclination of most people to reveal intimate and troublesome details of their lives to psychiatrists and psychotherapists has been widely commented on:

> Even those who are well-informed on other matters consider a person's treatment by a psychiatrist as evidence of his 'queerness' or even insanity.... A person may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men. Slovenko, "Psychiatry and a Second Look at the Medical Privilege," 6 Wayne L. Rev. 175, 188 (1960).

See also, Bernstein, "Psychotherapist-Patient Privilege under Federal Rule of Evidence 501," 75 Journal of Criminal Law and Criminology 388, 398 (1984); Messersmith, "Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501," 23 Washburn Law Journal 706, 711 (1984). This reticence, combined with the unmistakable individual and societal benefit to be gained from open disclosure, have led to the recognition of the need for a physician-patient privilege. Although

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and further recognize that a great deal of information about the alleged offense may be contained in the expert psychiatric report:

> It is common in psychiatric evaluation that a great deal of private and highly personalized material is revealed.... In a criminal proceeding, for example, further revelation regarding the alleged offense may be forthcoming in the context of the psychiatric evaluation.[11]

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[10](continued from previous page) the privilege did not exist at common law, see 8 J. Wigmore, Evidence in Trials at Common Law §2380, at 819-820 (J. McNaughton rev. ed. 1961), forty states and the District of Columbia have since 1828 enacted statutes preventing a physician from testifying about information relevant to the patient's treatment that was divulged to the physician in his professional capacity. Only Alabama, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Mexico, South Carolina, Tennessee and West Virginia do not have a statutory physician-patient privilege. The statutes enacted in the 40 other states vary widely in their formulation of the privilege. See "Developments in the Law: Privileged Communications," 98 Harv. Law Review 1450, 1532 (1985). Nonetheless, they collectively demonstrate the legislative recognition of the need for open disclosure, and the degree to which that openness is not always forthcoming.

[11]Leigh M. Roberts, M.D., p. 141, op. cit., fn. 4 , supra.

Significantly, however, most forensic psychiatrists, in conducting a psychiatric examination for the defense, presume that the contents of their report will not be turned over to the prosecution if they are not called as a witness by the defense:

> In the case when a psychiatrist performs an evaluation initiated by the defendant for purposes of providing the defense attorney with assistance in preparing for and conducting the trial, then communications between the evaluator and the defendant are privileged under the attorney-client privilege. The defendant does not waive the attorney-client privilege with regard to those psychiatric consultations that the defendant does not intend to use at trial.[12]

Slovenko explains the reason why the contents of such a report are privileged:

> Under the adversary system, each side is expected to put its best

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[12] Slovenko, "Forensic Psychiatry," in Kaplan and Sadock (eds.), 2 Comprehensive Textbook of Psychiatry, p.1960, 1965 (1985) (hereinafter Comprehensive Textbook of Psychiatry).

foot forward, with the judge and jury deciding between them on the basis of the evidence offered. The issues are polarized. Thus, when prosecutors decide to undertake a prosecution, they must prosecute to the best of their ability. They do not ask the jury to return a verdict of not guilty. Neither would the defense counsels argue that their clients are guilty of the crimes charged.... Attorneys put experts or other witnesses on the stand only if they will advance the interests of their clients. Under the work-product rule, the attorneys have a right not to divulge experts whom they have cnsulted but have decided not to use because of their unfavorable reports.[13] (emphasis added)

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[13] Comprehensive Textbook of Psychiatry, supra, at 1961. See also Kern, "Criminal Responsibility and the Psychiatrist," in N.J. Psychiatric Association (ed.), Medico-Legal Digest for New Jersey Psychiatrists, p. 14-1 (1982):

> If the psychiatrist is hired by the prosecution, the prisoner should be warned that he is free to refuse to answer any questions.
>
> The relationship of a prosecutor's examiner to the examinee is not a therapeutic relationship and it is not unethical to reveal private details of the examination. In this situation, the physician is an agent of the prosecution and is not the defendant's therapist.
>
> A psychiatrist hired by the defense is in a different position. The

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When a psychiatrist operates on the assumption that an adverse report will not be provided to the State, he is free to conduct the type of wide-ranging inquiry and investigation necessary to evaluate whether an insanity defense is viable. Candor and openness from the defendant are certainly more likely if the defendant is assured that the internal strategic processes of the defense are intact. The psychiatrist is then free to ask the defendant questions concerning his appreciation of the nature and quality of the act in question, his understanding of whether it was right or wrong and he is free to probe whether at the time of the alleged offense the defendant

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[13](continued from previous page) defendant has been advised to tell everything to the doctor and if the doctor testifies, he swears to tell the whole truth. Therefore, if the doctor's testimony would damage the defense case, he should so advise the attorney who may choose another physician to examine his client. (emphasis added)

was, or was not, suffering from a mental disease or defect. If a psychiatrist knows from the outset that the report need not be given to the State if he concludes that the defendant was not insane at the time of the offense, then he operates from the perspective of maximum professional candor. Without confidentiality and without a shield against compelled disclosure to the State, no defendant will have the confidence in the psychiatrist which will enable the psychiatric professional to do that which his experience and training qualify him to do -- render an expert opinion. Unless the confidence is inviolate, there will of necessity be restraints upon communication between the defendant and his potential expert witness.

III. AS AN EXPRESSION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, NEW JERSEY HAS FOR NEARLY THREE DECADES, GRANTED THE DEFENSE THE LATITUDE TO FULLY EXPLORE AND DEVELOP PSYCHIATRIC DEFENSES WITHOUT THE FEAR THAT UNFAVORABLE MATERIAL SO OBTAINED CAN BE USED AGAINST THE DEFENDANT

For nearly three decades, criminal defendants in the State of New Jersey have enjoyed the maximum freedom to explore the soundness and advisability of offering a particular defense without the fear that any unfavorable material so obtained can be used against them. The rule safeguarding the internal strategic processes of the defense has existed in New Jersey since 1957 as an expression of the Sixth Amendment right under the United States Constitution to effective assistance of counsel and of the analogous, and identical, provision of the New Jersey Constitution. Although the New Jersey Supreme Court has been presented with numerous opportunities to relax, weaken or

modify the protection it established in 1957, it has declined to do so. Instead, the state's highest tribunal has continually explicitly reaffirmed the constitutional protection previously articulated. Plainly, the constitutional guarantee articulated in New Jersey is an essential ingredient of its criminal justice system, and is not viewed by the Court as working an unjust result on the effort of the State to prosecute allegedly criminal behavior.[14] In fact, in the course of its decision affirming the 1957 State v. Kociolek precedent, the Supreme Court firmly announced in State v. Mingo, 77 N.J. 576, 392 A. 2d 590 (1978) its belief that such a rule "will not in any way hamper the State's ability to effectively prosecute its case."[15]

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[14]New Jersey is among ten states in which a judicial decision holds that defense-requested mental evaluations are protected by the attorney-client privilege. See Appendix C, Opening Brief of Petitioner Smith, filed December 5, 1985.

[15]State v. Mingo, 77 N.J. 576, 587, 392 A. 2d 590, 595 (1978).

> In the vast majority of cases, the State will be able to obtain its own expert on any matter as to which it considers expert testimony potentially necessary. The interests of justice are considerably advanced when a defendant receives the most effective assistance of counsel possible. Since the State's primary interest is not to convict but to see that justice is done, it, as well as defense attorneys, should welcome the positive effect our decision will have on the administration of criminal justice in New Jersey. State v. Mingo, 77 N.J. 576, 587-588, 392 A. 2d 590, 595 (1978).

If any doubt existed that the Kociolek rule enhanced the administration of justice in New Jersey, such doubt was laid to rest after Mingo.

In State v. Kociolek, 23 N.J. 400 (1957), 129 A. 2d 417, the New Jersey Supreme Court first established the constitutional foundations of the rule that a defense-retained psychiatric expert may not be called as a witness by the State if the defense does not intend to rely on his testimony. In Kociolek, the cost of the psychiatric examination was borne by the County due to the defendant's indigence as

Smith's exam was paid for by the Commonwealth herein. In Kociolek, the State obtained a copy of the report directly from the physician. 23 N.J. at 411-412, 129 A. 2d at 423 . The Court found that the State's calling the defense psychiatrist as a rebuttal witness in the guilt phase violated the attorney-client privilege, a necessary basis of both the constitutional right against self-incrimination and the right of a criminal defendant to effective assistance of counsel in his defense:

> The psychiatrist was retained to... impart to [the accused's] attorneys the benefit of his expert judgment and experience for their use in the preparation and presentation of the defense; and the communications made by the accused to the psychiatrist in response to his interrogation... are privileged, just as much so as if the revelations had been made by the accused directly to his attorneys. The privilege extends to the necessary intermediaries and agents through whom the communications are made. And it includes communications between the attorney and a scientific expert retained to aid in the presentation of the defense, a confidential employment. The principle is of the essence of the ancient common-law attorney-

> client privilege, in this country and in England and the continental countries deemed a basic civil right, indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law.
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> * * *
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> The privilege is an accommodation of competing interests, the ascendency for compelling policy reasons of the protection from unauthorized disclosure of communications between attorney and client over general testimonial duty and compulsion in the interest of truth and justice. The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security is yet essentially interrelated with the specific constitutional guaranties of the individual's right to counsel and immunity from self-incrimination, the oldest of the privileges for confidential communications. 23 N.J. at 413-414, 414-415; 129 A. 2d at 424, 425.

In Kociolek, the New Jersey Supreme Court determined, and properly so, that the attorney-client privilege is of historical origin in the representation of the accused.

23 N.J. at 414-416, 129 A. 2d at 425 .[16]

In ruling in Kociolek that the "privilege

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[16] The original rule barring attorneys from revealing client confidences was based upon consideration for the oath and honor of the attorney rather than for the apprehensions of the client, and upon the belief that gentlemen do not reveal secrets entrusted to them. 8 Wigmore, Evidence §2290, at 543 (McNaughton rev. ed. 1961) (hereinafter Wigmore).

However, with the shift in the factual orientation of trials, a new need for the privilege emerged. Up until 1450 in England, jurors did not hear evidence so much as they reached conclusions based on their prior knowledge of the case as members of the community. Wigmore, supra, §2190, at 62. See also J. Thayer, A Preliminary Treatise on Evidence at the Common Law, at 47-48, 90-93 (1898) (hereinafter, Thayer). Indeed, procedures for compelling testimony did not generally exist. A witness who volunteered testimony was viewed as an unwanted intermeddler and subjected to suit for maintenance, a common law tort for stirring up litigation. Wigmore, supra, §2190, at 63-64. Gradually, the common law trial process changed. During the period 1450-1460 equity courts recognized a subpoena that the Chancellor might issue on behalf of the plaintiff to a non-party witness. Thayer, supra, at 129. A similar change in the law courts did not occur until the sixteenth century, when in 1562-1563, the Statute of Elizabeth abolished the tort of maintenance (stirring up litigation) and authorized penalties for a witness' refusal to testify after service of process and tender of expenses. Wigmore, supra, §2190, at 65. With the risk

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is in vain if it does not secure freedom of professional consultation," 23 N.J. at 415 , 129 A. 2d at 425, the Court laid the

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[16] (continued from previous page) of compelled testimony came the need to examine the concept of privilege.

The first privilege to spring forth following the risk of testimonial compulsion was the attorney-client privilege. Wigmore, supra, §2290, at 542-543. The attorney-client privilege was recognized in the reign of Elizabeth I in numerous cases that followed closely on the heels of the Statute of Elizabeth. Wigmore cited and analyzed numerous cases which held that an attorney could not be compelled to disclose the confidences of his client:

> Berd v. Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577) (solicitor exempted from examination touching the cause); Dennis v. Codrington, Cary 143, 21 Eng. Rep. 53 (Ch. 1580) (on a motion to examine one Oldsworth, "touching a matter in variance, wherein he hath been of Counsel, it is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties or with either of them by reason of any annunity or fee"); Kelway v. Kelway, Cary 127, 21 Eng. Rep. 47 (Ch. 1580) (solicitor of plaintiff to be examined for defendant, "upon any interrogatory which shall not be touching the secrecy of the title or of

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groundwork for its later decisions in State v. Mingo, 77 N.J. 577, 392 A. 2d 590 (1977) and State v. Williams, 80 N.J. 472, 404 A. 2d 34 (1978).

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[16] (continued from previous page) any other matter which he knoweth as solicitor only"); Roll, C.J., in Waldron v. Ward, Sty. 449, 82 Eng. Rep. 853 (K.B. 1654) ("He is not bound to make answer for things which may disclose the secrets of his clyent's cause"); Sparke v. Middleton, 1 Kebl. 505, 83 Eng. Rep. 1079 (K.B. 1664) (counsel required in testifying to tell only "such things as he either knew before he was of counsel or that came to his knowledge since by other persons"); Legard v. Foot, Rep. t. Finch 82, 23 Eng. Rep. 44 (Ch. 1673) (attorney privileged); Anonymous, Skin. 404, 90 Eng. Rep. 179 (K.B. 1693) (counsel privileged). Wigmore, supra, §2290, at 542.

Later English cases made it plain that the foundation of the rule is "out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." Greenough v. Gaskill, 1 Myl. E.K. 98, 103 (1833). Without secrecy of communication, there cannot be the "unrestricted and

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In State v. Mingo, supra, decided twenty-one years after Kociolek, a unanimous New Jersey Supreme Court ruled that permitting prosecutorial discovery of a report of a handwriting expert retained by the defense, and the use of that expert as a witness by the State, violated the defendant's Sixth Amendment right to counsel. The decision in Mingo was based on the recognition that in order to provide effective representation an attorney must be afforded the latitude and the freedom to fully explore and develop a meritorious defense on his client's behalf without risking a "crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial." State v. Mingo, 77 N.J., supra, at 582, 392 A. 2d, supra, at 592

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16 (continued from previous page) unbounded confidence in the professional agent" which is essential to the administration of justice." Anderson v. Bank, L.R. 2 Ch. D. 644, 649 (Jessel, M.R. 1876).

In Mingo, the Court affirmed a crucial element of its Kociolek holding, i.e. that any scientific expert retained by the defense -- whether it is a psychiatrist, pathologist, handwriting expert, or ballistics expert -- functions as the agent of the attorney and that therefore any communication by the defendant to him is the legal and functional equivalent of a communication by the defendant to the attorney himself. 77 N.J., supra, at 583, 392 A. 2d, supra, at 593 . See also 8 Wigmore, Evidence §2301 (McNaughton rev. 1961) and cases collected and cited therein.

The Court then reiterated the Kociolek rule that defendant's attorney must have full investigative latitude in developing a meritorious defense, and that the State had no justification for calling the defendant's expert as its witness. The Sixth Amendment foundation of such a rule was reaffirmed:

> [T]he State had no justification for calling defendant's handwriting

> expert as its witness. If it considered the identity of the disputed note's author to be a critical part of its case, the State was fully capable of retaining its own expert....
>
> The right to counsel afforded criminal defendants by the Sixth Amendment of the United States Constitution and by Art. I, par. 10 of the New Jersey Constitution comprehends the right to the effective assistance of counsel. To safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial. State v. Mingo, 77 N.J., supra, at 581-582, 392 A. 2d, supra, at 592.

The Court's opinion went beyond establishing a bare-bones rule. Instead, Justice Pashman's opinion articulated detailed procedures which govern the discovery process for expert opinion in criminal cases:

> a. The ruling is limited to reports of opinions of expert

witnesses, and has no bearing upon the discovery or utilization at trial of information of any other nature assembled by the defense. 77 N.J. at 585, 392 A. 2d at 594 .

b. The defense must indicate that it has obtained a report it intends to use at trial if the State poses that question in discovery. Discovery of the report must then be granted to the State. 77 N.J. at 585-586, 392 A. 2d at 594.

c. Although the State may cross-examine the expert testifying for the defense, the defense does not waive its right to control the testimonial use of the expert -- he remains unavailable to the State as a witness. 77 N.J. at 586, 392 A. 2d at 595.

d. Should the defense elect not to present the expert as a witness after previously indicating to the contrary, the fact that his otherwise confidential reports have been disclosed to the prosecution does not entitle the State to call the expert as its expert over objection by the defense. 77 N.J. at 586, 392 A. 2d at 595.

e. Court orders can be entered to obviate any danger that the defense might deprive the State of expert assistance by "scooping up" all the experts in the rare case involving a subject as to which the number of qualified experts is few. 77 N.J. at 587, fn. 3, 392 A. 2d at 595.

The policy underlying the Mingo holding was declared by the Court -- the internal strategic processes of the defense must be safeguarded if effective assistance of counsel is to be guaranteed:

> This rule will safeguard the internal strategic processes of the defense...by affording (counsel) the maximum freedom to seek the guidance of expert advice in assessing the soundness and advisability of offering a particular defense without the fear that any unfavorable material so obtained can be used against his client...Reliance upon the confidentiality of an expert's advice itself is a crucial aspect of a defense attorney's ability to consult with and advise his client. If the confidentiality of that advice cannot be anticipated, the attorney might well forego seeking such assistance, to the consequent detriment of his client's cause. The protection from unwarranted disclosure we today mandate is an indispensable element of a criminal defendant's constitutional right to the effective assistance of counsel. 77 N.J. at 587, 392 A. 2d at 595.

One year later, the New Jersey Supreme Court broadened the Mingo holding. In State v. Williams, 80 N.J. 472, 404 A. 2d

34 (1979), the Court extended the Mingo/ Kociolek protection to bar discovery of statements of fact witnesses, prepared by the defense, which counsel does not intend to use at trial. 80 N.J., supra, at 480-481, 404 A. 2d, supra, at 38. In Williams, an Order had been entered requiring the defense to turn over to the State discovery of photographs shown to the victim by the defense in which she positively identified the defendant, along with a memorandum prepared of the session by defense counsel. In ruling that such a procedure "trespassed on defendant's right to effective assistance of counsel," 80 N.J. at 477, 404 A. 2d at 37, the Court reiterated the Mingo holding and its Sixth Amendment underpinnings:[17]

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[17] See also State v. Mingo, 77 N.J., supra, at 583-584, 392 A. 2d, supra, at 593, where the Court reinforced the constitutional assumptions that underlay its earlier decision in Kociolek:

> We also find our decision in Kociolek, 23 N.J. 400 (1957), although formulated in terms of the

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The investigative course selected by an attorney in order to prepare a proper defense for his client frequently entails a high order of discretion. This often calls for more than simple fact gathering.... Blanket discovery of the fruits of this kind of legal creativity and preparation may impact directly upon the freedom and initiative which a lawyer must have in order to fully represent his client. State v. Mingo, supra. Curtailment or inhibition of this attorney function by discovery, not otherwise justified to avoid trial surprise, would permit the State to undermine the effectiveness of an attorney in serving his client.

It is abhorrent to our concept of criminal justice to compel a defendant, under the guise of reciprocal discovery, to disclose to the State inculpatory evidence uncovered by defense counsel during his preparation for trial and then

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[17] (continued from previous page) attorney-client privilege, to be highly relevant as a matter of the defendant's right of effective representation by counsel.... The rationale of Kociolek is that the psychiatrist was the agent of the attorney and that therefore any communication by the defendant to the psychiatrist in the course of his examination was the equivalent of a communication by the defendant to the attorney himself.

> allow the State to use that evidence as part of its case in chief. That is exactly what happened in this case. State v. Williams, 80 N.J., supra, at 479, 409 A. 2d, supra, at 38 .

Thus, for over thirty years New Jersey courts have viligantly protected the Sixth Amendment right to a fair trial by shielding the internal strategic processes of the defense from discovery by the prosecution. In so doing, the Court has avoided "chilling" defense preparation and investigation,[18] and has implemented a rule which in the Court's opinion should have a "positive effect...on the administration of criminal justice in New Jersey." State v. Mingo, 77 N.J., supra, at 588, 392 A. 2d, supra, at 595. Amicus accordingly urges this Court

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[18] To hold otherwise would infringe on a defendant's constitutional right to the effective assistance of counsel because of the chilling effect it would have on defense investigation." State v. Williams, 80 N.J., supra, at 478, 404 A. 2d, supra, at 37 .

to consider the successful experience of the New Jersey courts, and the Sixth Amendment underpinnings thereof, as part of its deliberations in the case at bar. Although the arguments of petitioner Smith before this Court are couched principally in terms of the Fifth Amendment's right against self-incrimination, in at least one decision, this Court has considered attorney-client privilege arguments sua sponte when they had not been asserted by the defendant. In Fisher v. United States, 425 U.S. 391 (1976), defendant taxpayers sought to protect from Government discovery their accountants' reports which had been turned over to their counsel, and had relied on the Fifth Amendment:

> The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears

> to agree unqualifiedly. The difficulty is that the taxpayers have erroneously[19] relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment. Fisher v. United States, 425 U.S., supra, at 402.

The decision in United States v. Nobles, 422 U.S. 225 (1975) also reflects this Court's recognition that the attorney-client privilege is frequently intertwined with Fifth Amendment claims. Nobles presented for review the defense contention that its

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[19] Amicus does not in any way suggest that petitioner Smith's reliance on the Fifth Amendment herein was erroneous. Such reliance is amply supported by the law and facts involved in this case.

investigator's contemporaneous report of prosecution eyewitnesses' identifications of the defendant was not discoverable by the State. Although the Court was not persuaded that the Fifth Amendment prevented disclosure of the materials sought by the State,[20] it did however find that the attorney-client privilege applies to the preparation of defense investigative reports, and the privilege was held theoretically applicable to agents of the defense, persons who function in the same capacity as did Dr. Pile

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[20] In Nobles, the Fifth Amendment claim was rejected because it "does not extend to the testimony or statements of third parties called as witnesses at trial." 422 U.S. at 235 (emphasis added). It is plainly distinguishable from the case at bar, since unlike the defense investigator in Nobles, Dr. Pile was not called as a witness by the defense.

in the case at bar. Plainly, the privilege extends beyond the statements of the accused to his counsel and is broad enough to include the statements of experts and other witnesses:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case. 422 U.S. at 238, 239 (emphasis added).

This Court also noted in Nobles the essential role that the work-product doctrine plays in the criminal justice system in

obtaining a fair trial for the accused:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.[21] The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards

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[21] See Upjohn v. United States, 449 U.S. 383, 389 (1981):

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence §2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

See also, The Attorney-Client Privilege and the Work-Product Doctrine, American Bar Association 7 (1983).

> assure the thorough preparation and presentation of each side of the case. 422 U.S. at 238.[22]

As early as 1826, this Court recognized the essential function of the attorney-client privilege.[23]

Finally, in Estelle v. Smith, 451 U.S. 454, 469-471 (1981), this Court found a Sixth Amendment violation when the contents of a court-ordered psychiatric examination of the defendant's competency to stand trial were used by the State in the sentencing hearing. Although the facts in Estelle are different from those in the case at bar -- i.e. in Estelle the exam was court-ordered, not, as here, done at the request of the defense -- nonetheless, the underlying reasoning of Estelle is fully applicable to the case at bar, and supports reversal. In Estelle, this Court found that the

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[22] The Court, however, in Nobles found that the privilege had been waived. 422 U.S. at 239.

[23] See Chirac v. Reinicker, 24 U.S. 280, 294-295 (1826).

examination of the defendant by a psychiatrist was a "critical stage" in the proceedings against the defendant, within the contemplation of Powell v. Alabama, 287 U.S. 45, 57 (1932). That being so, the assistance of counsel was needed to evaluate the possible uses of the examination, and to weigh the comparative risks and benefits of such an examination before deciding whether to submit to the exam. Estelle v. Smith, 451 U.S., supra, at 471. In the case at bar, the same considerations apply. Petitioner Michael Marnell Smith is equally unable without counsel to evaluate the benefits and risks of a psychiatric examination, or, without legal counsel, to develop possible defenses.[24] The strategy decisions necessary

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[24] In Powell v. Alabama, 287 U.S., supra, at 69, the Court found that the accused has no ability to cope with the complexities of the law unassisted:

> Even the intelligent and educated layman has small and sometimes no

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for an effective defense are impossible without counsel. Thus, the same constitutional principles articulated in Estelle v. Smith, supra, compel the conclusion that in the case at bar the Sixth Amendment protects internal strategic decisions of the defense from being discovered or used by the prosecution.

Thus, the experience of the courts in New Jersey over nearly three decades establishes that the administration of

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[24] (continued from previous page) skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one.

justice is benefitted when counsel for the defendant has the latitude to explore all possible defenses without the chilling effect caused by the spectre of having to turn such a report over to the State. In New Jersey, such a result is grounded in the Sixth Amendment, and would protect reports such as Dr. Pile's from use by the State. The New Jersey experience, along with the prior decisions of this Court, make it plain that the Sixth Amendment forbids the abhorrent procedure utilized in this case.

CONCLUSION

Based on the foregoing, amicus respectfully submits that this Court should reverse the judgment of the Fourth Circuit, set aside the sentence of death, and remand the matter for a new trial at which the Commonwealth of Virginia would be barred

from calling Dr. Pile as a witness or using any of the material contained in Dr. Pile's report.

Respectfully submitted,

ALFRED A. SLOCUM
ACTING PUBLIC ADVOCATE

By Linda G. Rosenzweig

Linda G. Rosenzweig
Director
Division of Mental Health
Advocacy

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